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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 220

CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the COUNTY OF SUFFOLK OF THE STATE OF NEW YORK,

Appellants,

v.

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORP. and TOWN OF BABYLON OF THE STATE OF NEW YORK,

Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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Appellees.

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment (order and remittitur) of the Court of Appeals of the State of New York entered March 5, 1970, affirming an order of the Appellate Division of the Supreme Court, Second Judicial Department, which modified, and, as modified affirmed a judgment of the Supreme Court at Special Term, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The memorandum opinion and amending memorandum in the Special Term of the Supreme Court is unreported and is printed in Appendix A hereto, infra, p. 11. The memorandum opinion of the Appellate Division of the Supreme Court, Second Judicial Department, is reported in 32 A.D. 2d 929, 303 N.Y.S. 2d 584, and printed in Appendix A hereto, infra, p. 21. The New York Court of Appeals affirmed the order of the Appellate Division without opinion. Its determination is unreported, and its order and remittitur is printed in Appendix A hereto, infra, p. 22.

Jurisdiction

This suit was brought by the former owners of the land to cancel a tax deed issued by the Treasurer of Suffolk County, New York, to Pact Realty Corp. to bar the claim of all persons to the realty and for other relief. The answers of the defendants were stricken and the relief sought, and more, granted. The order of the Court of Appeals was entered May 5, 1970, and notice of appeal was filed in the office of the Clerk of the Supreme Court, Suffolk County, on June 1, 1970.

The judgment was granted on the basis of Chapter 152 of the Laws of New York, 1929, as amended by Chapter 745 of the Laws of 1959: the New York courts upholding the validity of those state statutes. They were drawn in question by the answer of the tax sale purchaser which in an affirmative defense asserted any nullification of the

deed upon the grounds alleged in the complaint would result in a deprivation of federal constitutional rights under Article I, Section 10, and Amendment Five of the United States Constitution.

The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following representative cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *James Stewart & Co.* v. *Sadrakula,* 309 U.S. 94, 60 S. Ct. 431, 84 L.Ed. 596; *People of the State of New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 49, S. Ct. 61, 73 L. Ed. 184; *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165; *American Oil Co.* v. *Neill,* 380 U.S. 451, 85 S. Ct. 1130, 14 L. Ed. 2d 1.

Question Presented

After a tax sale is held and a contract thereby entered into between a county treasurer and a tax sale purchaser, may the subsequent act—or failure to act—of a third party municipal functionary, whose acts are by state statute deemed to be only directory and not mandatory, void the sale and render ineffectual the tax deed subsequently delivered pursuant to the contract, with the effect of depriving the government of its power to collect taxes?

Statutes Involved

United States Constitution, Article I, Section 10; Amendment V.

Sections 70 and 71 of the Suffolk County Tax Act (Laws of New York 1929 Chapter 152 as amended by Laws 1959, Chapter 745); section 1160(1) of the Real Property Tax Law, McKinney's Consolidated Law of New York, Book 49A (Laws of New York 1958, Chapter 959), are set forth in Appendix B hereto.

Statement

The determination of the New York Court of Appeals from which this appeal is taken not only impairs the obligation of a contract, and deprives a tax sale purchaser of his rightful property, it deprives local districts, governments and the state of imposed taxes and the power to tax. It is therefore of basic and far-reaching importance.

Presentation of the Federal Question

The federal question sought to be reviewed was raised in the court of first instance by an affirmative defense in pleading [Record (Appellants' Joint Appendix, stipulated as the whole record to be considered by the Court of Appeals, A147) pp. A59-A60]. The Supreme Court of New York passed upon the federal question by striking the answers of all the defendants [R, A15] and granting the relief demanded in the amended complaint [R, A15, A44-A45] and more (by voiding the tax sale as well as the deed) [R,

A15], on a motion and cross-motion for summary judgment [R, A18-A130] resolved in favor of the plaintiff. With a modification not important to this appeal, the Appellate Division affirmed [R, A150-A154] and the Court of Appeals affirmed the Appellate Division without opinion [R, Court of Appeals Order and Remittitur].

Nature of the Case

Appellees Rogers owned property on which they did not pay the second half tax for 1963-64. On November 16, 1964, appellant Jacobs, the Suffolk County Treasurer, sold the property at a tax sale. Appellee Pact Realty Corp., hereafter Pact, purchased the property which was not redeemed within the statutory period for redemption. The Treasurer gave a tax deed for the property to Pact on January 28, 1968, and it was recorded three days later [R, A132].

Contending that the tax bill for the property for the year 1964-65, which was made after the tax sale, did not have the word "arrears" stamped on it, as required by §71 of the Suffolk County Tax Act (Appendix B, infra, p. 25), and that the assessment roll for 1964-65, which was completed before the tax sale, likewise failed to have the tax item in question similarly marked as required by Suffolk County Tax Act §70 (Appendix B, infra, p. 25), Rogers, plaintiffs in the lower court, brought a bar claim action (the complaint is set forth in R, A31-A52) for judgment cancelling the tax deed and barring all persons from claiming as against plaintiffs any interest in the property.

The defendants, who were also appellants in the state courts, denied the material allegation of the complaint, except as to some facts of public record, and raised issues

including the question sought to be reviewed. Pact moved for summary judgment and Rogers cross-moved; the Special Term granted the cross-motion and the relief demanded in the complaint, and more (apparently under a prayer in the complaint for other and further relief) and struck out the answers of all defendants.

This judgment disposed of the assertion in the answer of Pact that voiding the contract made at the tax sale impaired the obligation of the contract and deprived Pact of its property without due process of law.

Making a technical modification and severing Pact's cross-claims against the appellees Town of Babylon and appellant, the Appellate Division affirmed the judgment [R, A153] on the basis of the invalidity of both the tax sale and tax deed because of the failure of the 1964-65 tax bills to have stamped thereon the word "arrears."

The Court of Appeals affirmed, without opinion, the order of the Appellate Division.

The Question is Substantial

In New York, all taxes imposed by school and other districts, most of the taxes imposed by towns and counties, and some of the taxes imposed by the state, are based on the ownership of real property. The collection of the tax is enforced, in cases of non-payment, by the sale by county treasurers of the property.

The tax sale creates a contract which is subject to defeasance only if the property owner redeems the property

within a statutory redemption period—in this case, three years.

After the tax sale, and during the period of redemption, functionaries of the town (the assessors, supervisor and tax receiver) prepare assessment rolls, tax bills and notices. The county treasurer, who conducts the sale, has no control over their acts. Doubtless for that reason a general and controlling state statute, §1160 of the Real Property Tax Law (Appendix B, infra, p. 26) provides that such acts are directory only and that failure to perform them shall not invalidate the lien of the tax on the property nor affect the title of the purchaser.

Notwithstanding, the New York courts have held such a directory act, viz., stamping "arrears" on a tax bill issued after the sale, if omitted, acted to void the sale, and, subsequently, the tax deed granted pursuant to the tax sale contract.

The state statutes, pertinent here, which provide for the acts of third parties are §§70, 71 Suffolk County Tax Act (Appendix B, infra, p. 25).

From the outset it was asserted by the defendant in the state courts that if it was applied as mandatory (and it was so applied) those statutes were invalid by reason of repugnancy to the federal constitution.

This Court held in *Wood* v. *Lovett*, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404, that the sale of land for delinquent taxes constitutes a contract between the purchasers and the taxing municipality to whom the authority to sell has been

delegated by the state, and is within the constitutional provisions prohibiting impairment of the obligation of contracts.

The contracting parties are subject to the law in force at the time, and it is not contended any legislative action impaired the contract. Rather, it is the application put on the statutes necessitating third parties to perform ministerial and directive functions with which we are concerned. The Court of Appeals decisions has made mandatory that which the legislature said was to be directory, and by so doing has made §§70 and 71 of the Suffolk County Tax Act repugnant to the United States Constitution, Article I §10, and Amendment V.

Moreover, in order so to do, the Court supplied, as to appellant, an essential fact not in the record. The decision required a finding the 1964-65 tax bill did not have the word "arrears" stamped on it. There was no unequivocal statement in the complaint or otherwise before the court that this was the case. The bill was not before the Court. Rogers and Pact stipulated this was the fact [R, A27-A28], but appellant did not join in that stipulation. The only inference of the failure to place arrears on the 1964-65 bill was in paragraph 12th of the amended complaint [Record, A40] and this was denied in appellants' answer [R, A71].

The statements in the affirmation of Rogers' attorney that the word "arrears" was missing on the bill was based on the stipulation referred to, to which appellant was not a signatory.

When there are issues of material fact present, summary judgment is not properly granted. It is available as

a remedy when no material facts are in dispute and only questions of law are before the Court.

The error of supplying this key but missing fact is a profound one. But even though it were a fact the tax bill made after the contract did not have "arrears" stamped on it by a third party, that is not enough to void the contract for the law in effect at the time of the tax sale did not mandatorily require such notation. The error is judicial legislation.

In Suffolk County there are thousands of parcels sold for taxes annually and as the sales create arrears, by definition in §70 of the Tax Act, "[a]ll sales of property for non-payment of taxes or assessments shall be considered arrears * * *" the direction that the third party tax receivers in the county's ten towns stamp arrears on the tax bills sent out two or three weeks after the sale, when, pursuant to the same section, the treasurer does not notify the town authorities until "on or before September" of the following year, is one impossible to comply with as a practical matter.

Thus, although this case involves a relatively small amount dollarwise in its direct effect, indirectly it adversely affects the collection of very substantial sums of tax dollars, results in the impairment of thousands of contracts, and throws into question the title of thousands of parcels of real property, many of which are insured by title companies for amounts running into hundreds of thousands of dollars.

It is submitted the decision of the New York Court of Appeals erroneously applies law to a statute so that it re-

sults in the unconstitutional impairment of a contract, and, by cancelling a recorded deed, deprives a party of property without due process of law under the federal constitution.

The resulting question presented by this appeal is substantial and of great public importance.

Respectfully submitted,

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APPENDIX A

Opinions Below and Order Appealed From

Memorandum

SPECIAL TERM PART I

By GEILER J. S. C.

Dated November 25, 1968

SUPREME COURT, SUFFOLK COUNTY

Motion No. 2748
Ind No. 164,335
9/3/68

Motion by defendant Pact Realty Corp. (hereinafter referred to as Pact) for summary judgment dismissing the complaint and cross motion by plaintiffs for summary judgment.

Plaintiffs instituted this action pursuant to Article 15 of the Real Property Law of the State of New York, to set aside a tax deed executed and delivered by defendant Treasurer of the County of Suffolk (hereinafteer referred to as Treasurer) to Pact.

Plaintiffs admittedly failed to pay the second half of the 1963/64 taxes on their property located in the Town of Babylon, County of Suffolk. Pact purchased the subject property at a tax sale on November 16, 1964. The property was not redeemed within the 36 month redemption period and the Treasurer delivered a tax deed to Pact on January 28, 1968. Pact recorded the deed on January 31, 1968.

The parties herein have stipulated to the following facts:

1. The tax bill for 1964/65 and the assessment roll for 1964/65 did not have the word "arrears" stamped thereon.

2. The "County Treasurer's Notice" was not printed on the bottom of the face side of the tax bills from 1963/64 through 1967/68 but was printed on the reverse side of said tax bills.

3. The "County Treasurer's Notice" provides:

> "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments upto a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

4. All of the above mentioned tax bills did not have a ruled column for arrears printed thereon.

Plaintiffs contend that the tax sale herein was void because the provisions of Section 71 of the Suffolk County Tax Act (hereinafter referred to as S.C.T.A.) were not strictly complied with by the taxing authorities. They especially argue that Section 71 of the S.C.T.A. required that arrears be noted on the 1964/65 tax bill and that the "County Treasurer's Notice" must be printed on the bottom of the front side of the tax bill.

Pact maintains that the plaintiffs have given an erroneous interpretation to Section 70 of the S.C.T.A. and therefore their contentions are without merit. The tax sale purchaser specifically asserts that the word "arrears" was not required to be noted on the 1964/65 tax bill because of the "operation of Section 70 of hte S.C.T.A. as amended in 1959." Pact also argues that the printing of the "County Treasurer's Notice" on the bottom of the reverse side of the tax bill complies with the requirements of Section 71 of the S.C.T.A.

Furthermore, Pact contends that plaintiffs' action is barred by the Statute of Limitations as contained in Section 63 of the S.C.T.A.

Section 71 of the S.C.T.A. provides:

> "SEC. 71. BILL OF TAXES TO SHOW ARREARS.
>
> There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land "Arrears" and at the bottom of said bill printed "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

What was the purpose of the Legislature in enacting Section 71 of the S.C.T.A.? Why did they so minutely describe what must be contained in each tax bill? Why is the tax bill so important?

The tax bill is the only actual or personal notice a property owner receives with reference to the taxable status of his property in Suffolk County. He will receive no other notice of the taxable status of his property unless the property is to be sold for unpaid taxes due thereon. Then the only notice he receives is that of the sale and this notice is not given personally but only by publication as prescribed by Sections 42 and 43 of the S.C.T.A.

The Legislature, cognizant of these facts, wanted to make certain that the property owner was made aware of any possible loss of his property because of unpaid taxes.

They wanted this notice to be given in such a manner so as to alert not only the knowledgeable but also the uninformed property owner.

What was the best way to accomplish their purpose? How could they make even the most unsuspecting property owner aware of any tax monies due and owing?

The Legislature came to the conclusion that their purpose could best be achieved by mandating the format of the tax bill which every property owner receives. They therefore determined that the front of all tax bills in Suffolk County should contain certain items from which a property owner, regardless of his knowledgeability of real estate taxes, could determine, at a glance, if there were any tax arrears and the title of the County official from whom the property owner could obtain such vital information. Hence, Section 71 was enacted and has not been amended to date.

The 1963/64 tax bill admittedly does not conform to the exact provisions of Section 71 of the S.C.T.A. Must there be strict compliance with Section 71? Is the failure to follow Section 71 fatal to a tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila* v. *Mitrany*, N.Y.L.J., December 24, 1965, P. 10 Col 5, affirmed by the Court of Appeals 21 N.Y.2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note "arrears" on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court

is guided by decisional law contained in the case of Ierna v. Maranzano, 211 N.Y.S.2d 616, Erlwein v. Patchogue Homes Corp., 43 Misc.2d 707, 252 N.Y.S. 2d 220 and Proschieck v. Erlwein, N.Y.L.J. 7/31/64, p. 8 col. 5, Aff'd. 22 A.D.2d 1018, leave to appeal denied 15 N.Y.2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission of the word "Arrears" on a subsequent tax bill, held that the provisions of Section 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance."

Pact maintains that neither Stebila, *supra,* nor the "arrears" cases cited therein are determinative of the issues herein because these cases were decided prior to the 1959 amendment of Section 70 S.C.T.A. The tax sale purchaser contends that Section 70 of the S.C.T.A., as amended in 1959, controls Section 71 S.C.T.A. and by its operation "arrears" was not required to be noted on the 1964/65 tax bill.

Section 70 of the S.C.T.A. as amended reads as follows:

"§70. County treasurer to furnish supervisors with list of arrears. ~~The~~ Following each tax sale the county treasurer shall make a ~~complete list of all taxes and assessments in arrears~~ and shall file with each town supervisor, on or before the first day of September of each year, a list of all ~~arrears of~~ property sold for unpaid taxes and assessments on property in such town remaining unredeemed. All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof received by the county treasurer as provided in sec-

tion sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list."

(NOTE: Changes or additions in text are indicated by underline, deletions by ~~strikeouts~~).

Pact's position is based on the following syllogism:

1. Plaintiff's property was sold in November, 1964.

2. The County Treasurer, by virtue of Section 70 S.C. T.A., was not required to file with the Town of Babylon a list, showing plaintiffs' property sold for unpaid taxes, until September 1, 1965.

3. Section 70 S.C.T.A. states that "all sales of property for non payment of such taxes or assessments shall be considered arrears." [Note this provision was also in Section 70 prior to 1959 Amendment.]

4. The meaning of arrears is limited to property sold for non-payment of taxes.

5. Arrears did not exist until after the sale of plaintiffs' property.

6. The Town of Babylon did not receive the list of arrears (property sold for unpaid taxes) from the County Treasurer until after the tax bills for the year 1964/65 were sent out in December 1965.

7. Thus, "arrears" was not required to be noted on the 1964/65 tax bill.

Plaintiffs' position is untenable. It is based on a definition of "arrears" which has been refuted by Justice Ritchie

of this Court in the case of *Erlwein* v. *Patchogue Homes Corp.*, 252 N.Y.S.2d 220, at page 223:

> "* * * the interpretation of the word 'Arrears', as included in the Suffolk County Tax Act means only those arrears that have been established by a sale of the property for unpaid taxes.
> The Court does not agree with plaintiffs' contention."

What if no one purchased a particular piece of property offered at a tax sale because of non-payment of taxes? Does this mean, because the property is not sold, that there are no arrears? Doesn't the tax receiver, in the first instance, determine if there are arrears?

Thus it is clear that "arrears" was never intended to be limited to mean property sold for unpaid taxes. The only reasonable definition of "arrears" is its ordinary usage as defined in Black's Law Dictionary, 4th Edition, at page 140: "Money unpaid at due time."

This Court does not agree with Pact's contention that the Legislature modified or changed the mandatory provisions of Section 71 S.C.T.A. by the amendment to Section 70 S.C.T.A.

McKinney's Statutes, Section 73 states at page 110:

> "The Constitution of this State vests the Legislative power in the Senate and Assembly and that the Courts may not divest or usurp that power has been announced so frequently and in such varying language to defy repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare and enforce the law, not to make it. No matter what disastrous consequences may result from following

> the expressed intent of the Legislature the Judiciary cannot avoid its duty * * * They may not by interpretation add to or take from a clear and positive legislative mandate or substitute that which must be brought into existence by legislative mandate * * * but public policy or opinion should not sway the judiciary to read into a statute that which the Legislature might have inserted but did not. * * *"

The Legislature had an opportunity to expressly change or modify Section 71 S.C.T.A. They chose not to do so. This Court will not change Section 71 S.C.T.A. by implication in view of the fact that the Legislature, if it intended to change Section 71 S.C.T.A., refused to expressly modify or change the mandatory requirements of said section.

Furthermore, an examination of Sections 70 and 71 of the S.C.T.A. indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at Page 412:

> "It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arises. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by a fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subjects."

Defendants are also erroneous in their contention that plaintiffs' action is barred by Section 63 S.C.T.A. Section

63 basically provides that an action to attack the validity of an assessment must be commenced within two years from the date of the receipt of the warrant by the receiver of taxes.

The plaintiffs are not attacking the validity of the assessment. They admit that the assessment is valid and thus Section 63 has no application herein.

The only section of the S.C.T.A. which is germane herein with reference to a statute of limitation period is 53. However, this action has been brought within the statutory period provided therein and therefore Section 53 is not an issue.

The Court abhors a forfeiture. It will not permit the plaintiffs, who have timely acted, to forfeit their real property because of the failure of the taxing authorities to comply with the provisions of Section 71 S.C.T.A.

The tax sale and deed are hereby declared invalid.

Plaintiffs' cross motion is granted and defendants' motion is denied.

Settle judgment.

/s/ William R. Geiler
J.S.C.

Appendix A

Memorandum Amending Memorandum of November 25, 1968

SUPREME COURT

SUFFOLK COUNTY

Special Term Part I

By GEILER, J.S.C.

Dated January 13, 1969

Motion #2748
9-3-68
Index #164,335

The Court, on its own motion, amends the decision dated November 25, 1968 to correct a typographical error on page 5 of the decision. The first sentence on page 5 shall read as follows:

"Pact's position is untenable."

/s/ WILLIAM R. GEILER
J.S.C.

Appendix A

Memorandum Opinion of Appellate Division, Second Department

By Christ, Acting P.J.: Brennan, Samuel Rabin, Munder and Martuscello, JJ.

ROGERS, res. v. PACT REALTY CORP., ap—Judgment of the Supreme Court, Suffolk County, dated Jan. 23, 1969, modified on the law, by inserting in the second ordering paragraph, following the word "answers," the words "to the amended complaint"; and by adding a paragraph severing the cross claims of defendant Pact Realty Corporation against the other defendants. As so modified, judgment affirmed, with one bill of $10 costs and disbursements to respondents, jointly against appellants filing separate briefs.

In our opinion, the tax sale and the tax deed to defendant Pact Realty Corporation, based on default in paying the second half of the 1963-64 taxes, were invalid because of the failure to have the word "Arrears" noted on the 1964-65 tax bill as required by section 71 of the Suffolk County Tax Act (see Hutch v. Platt, —— A. D. 2d ——, dec. herewith). The instant case does not involve the validity of a tax assessment and the provisions of section 63 of the Suffolk County Tax Act are therefore inapplicable. We find no grounds for disturbing the Special Term's determination, except as herein modified, in any of defendant's other contentions. The judgment is modified to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term.

Appendix A

Order Appealed From

No. 400

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of March in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 5, 1970.

2. No. 400. 69

WILLIAM ROGERS & ano., &c.,
Respondents,

vs.

PACT REALTY CORP., & ors., &c.,
Appellants.

BE IT REMEMBERED, That on the 4th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Pact Realty Corp., & ors., &c., the appellants

in this cause, came here unto the Court of Appeals, by Moses Krivis, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And William Rogers & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Elwood D. Hooper, their attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Moses Krivis, of counsel for the appellant Pact Realty, and by Mr. Stanley S. Corwin, of counsel for the appellants Jacobs and County, submitted by the appellant Town, and argued by Mr. William M. Johnson, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,)
Albany, March 5, 1970.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk.

APPENDIX B

Text of New York Statutes Involved

Suffolk County Tax Act §70 (Chapter 745 Laws 1959)

"SEC. 70. COUNTY TREASURER TO FURNISH SUPERVISORS WITH LIST OF ARREARS. Following each tax sale the county treasurer shall make and shall file with each town supervisor, on or before the first day of September of each year, a list of all property sold for unpaid taxes and assessments in such town remaining unredeemed. All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list."

Suffolk County Tax Act §71 (Chapter 152, Laws 1929)

"SEC. 71. BILL OF TAXES TO SHOW ARREARS. There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears and assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land 'Arrears' and at the bottom of said bill shall be printed 'Whenever any tax or assessment shall remain unpaid for six months from February first, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer."

Appendix B

Real Property Tax Law §1160(1)
(Chapter 959, Laws 1958)

§1160. TAX SALE AND SALE OF TAX LIEN

1. It shall be the duty of the enforcing officer to enforce annually all tax liens by a tax sale, in accordance with the provisions of law governing the conduct of such sales, except as otherwise provided herein. The failure of the enforcing officer to enforce such tax lien shall not impair the lien or prevent a sale or stay any other proceedings for its enforcement after the time specified. All provisions with respect to procedure upon tax sales and sales of tax liens requiring acts to be done at or within or before specified times or dates, except provisions with respect to length of notice, shall be deemed directory and failure to take such action at or within the time specified shall not invalidate or otherwise affect such tax lien nor prevent the accruing of any interest or penalty imposed for the non-payment thereof, nor prevent or stay proceedings under this article for any of the remedies for collection thereof in this article provided, nor affect the title of the purchaser under such proceedings.

SUPREME COURT, U. S.

In the United States Supreme Court

October Term, 1969 1970

Supreme Court, U.S.
FILED
JUN 3 1970
JOHN F. DAVIS, CLERK

No. [redacted]
221

WILLIAM ROGERS and ROSE ROGERS, his wife,

Appellees,

-against-

PACT REALTY CORP.,

Appellant,

TOWN OF BABYLON OF THE STATE OF NEW YORK; CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the COUNTY OF SUFFOLK OF THE STATE OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No.

WILLIAM ROGERS and ROSE ROGERS, his wife,
Appellees,

-against-

PACT REALTY CORP.,
Appellant,

TOWN OF BABYLON OF THE STATE OF NEW YORK; CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the COUNTY OF SUFFOLK OF THE STATE OF NEW YORK,
Defendants-Appellees.

JURISDICTIONAL STATEMENT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellant appeals from the final judgment of the Court of Appeals of the State of New York, entered the fifth day of March, 1970, which, having affirmed the order of the Appellate Division, Second Judicial Department, affirming a judgment of

the Supreme Court, Suffolk County, State of New York, sustained the constitutionality of Section 71 of Chapter 152 of the Laws of 1929, known as the Suffolk County Tax Act (referred to hereinafter as SCTA) and construed and applied Section 70 of said Chapter 152 of the Laws of 1929, as amended by Chapter 745 of the Laws of 1959, in this case, and to the prejudice of appellant, in a manner repugnant to

(a) Article I, Section 10 of the United States Constitution;

(b) Amendment V of the United States Constitution;

(c) Article I, Section 6 of the New York State Constitution;

(d) Article III, Section 1 of the New York State Constitution;

as pleaded by appellant in its answer as a FOURTH AFFIRMATIVE DEFENSE.

Appellant, therefore, submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial constitutional questions are presented.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court, Suffolk County (R 131-146)* is not reported. The opinion of the Appellate Division, Second Department (R 152-153), affirming the order

*Numbers in parenthesis, unless otherwise indicated, refer to pages in the Record to be certified and transmitted to this Court and filed with this statement.

of the Suffolk County Supreme Court, is reported in 32 AD 2nd 929. The decision of the Court of Appeals of the State of New York is reported in 26 NY 2nd 872.

JURISDICTION

This action attacked the Suffolk County tax sale of November 16, 1964 (and the tax deed to appellant issuing therefrom), of appellees' real property located in Suffolk County, for the nonpayment of the second half of the 1963/64 real estate taxes. Appellees amended complaint (R 31-52) attacked the tax sale and the subsequently issued tax deed as being void on the grounds that there was an omission of the word "arrears" from the assessment roll of 1964/65 and the tax bill for 1964/65 received by appellees in violation of Secs. 70 and 71 SCTA; that by these omissions appellees were not "given proper notice on the tax assessment rolls" (R 40) and "the tax bill for said tax year 1964/1965" (R 40) of the 1963/64 delinquency. Special Term upheld the complaint, holding that the "arrears" omission on the 1964/65 assessment roll was not involved herein.

The Appellate Division affirmed the judgment of Special Term, of the Suffolk County Supreme Court on the grounds that the omission of "arrears" on the 1964/65 tax bill, as required by Sec. 71 SCTA, mailed by the Tax Receiver after the tax sale, rendered the November 16, 1964 tax sale and later issued tax deed invalid. Except for severing appellant's cross claims against the other two defendants, the Appellate Division affirmed Special Term's judgment. The Court of Appeals, without opinion, affirmed.

Appellant's answer expressly pleaded the constitutional provisions of both the United States and New York Constitutions which appellant claimed were violated by Special

Term. Neither the Appellate Division nor the Court of Appeals made mention of the constitutional questions raised. By its affirmance, the Court of Appeals sustained the constitutionality of Special Term's construction of Secs. 70-71 SCTA to appellant's disadvantage.

The order of the New York Court of Appeals necessarily passed on and rejected appellant's constitutional allegations. The judgment of the New York Court of Appeals was dated March 5, 1970 and entered on March 5, 1970. Notice of Appeal was filed by appellant with the Clerk of the New York Court of Appeals and the Clerk of the Supreme Court of Suffolk County on May 26, 1970.

Thus, lying before this Court for review is a judgment of the highest court of New York State which has upheld the validity and constitutional construction of statutes of the State of New York, namely, § § 70 and 71 of the SCTA. This Court, therefore, has jurisdiction to review the judgment of the Court of Appeals by direct appeal, such jurisdiction being conferred on this Court by 28 U. S. Code, Section 1257 (2).

That this appeal properly lies before this Court for review is supported by numerous decisions. Applying the test of the term "statute of any state" as used in Section 1257 (2), it has been held generally by prior decisions of the Supreme Court, to embrace any legislative enactment, which the state has sanctioned or passed, not merely statutes of statewide application but statutes of purely local application, such as a city or town ordinance (*Reinman v. City of Little Rock*, 237 US 171, 35 S. Ct. 511, 59 L. Ed 900; *Zucht v. King*, 260 US 174, 43 S. Ct. 24, 67 L. Ed. 194; *Goldblatt v. Town of Hempstead, New York*, 369 US 590, 82 S. Ct. 987, 9 L. Ed. 2d 130).

While §§ 70 and 71 SCTA apply solely to Suffolk County, they nevertheless are statutes of the State of New York, within the meaning of 28 US Code Sec. 1257 (2) and, on this appeal, are cognizable by this Court under that Section.

SUBSTANTIAL QUESTIONS INVOLVED

The questions presented in this case are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution. The status of nearly every tax title issued by the Suffolk County Treasurer since 1959 is involved herein, since every Suffolk County Treasurer has interpreted §§ 70-71 exactly as has Chester F. Jacobs, the Suffolk County Treasurer involved as a defendant in this case. As a result of the decision appealed from, the bulk of the last ten years tax sales are invalid for the same reasons as were advanced in this case.

The Treasurers' interpretation of §§70-71 SCTA was accepted by the public, title companies and mortgage lenders for 10 years. Industrial, public and residential structures have now been built on some of the vacant land conveyed by tax deeds issued under that interpretation. Under the rule of this case, if not reversed, present occupants of said structures built on such land will be dispossessed by the delinquent taxpayers involved, to the great financial loss of title companies and mortgage lenders. The County will have to refund all the consideration it has received from grantees to whom it had conveyed title based on such tax sales. The economy of Suffolk County will be seriously affected by this decision.

Thousands of tax titles, since 1959, have become unsettled, by the rule of the law of this case. §71 SCTA was enacted in 1929, after which every Suffolk County Treasurer issued tax deeds which carried the alleged defects attacked in

this case. If it is subsequently held by the courts that no statute of limitation has begun to toll in favor of these earlier recorded tax deeds then the Suffolk County economy will be substantially destroyed.

Since appellant alleged in its Answer (R59-60), in the first instance that the interpretation placed upon §70 and §71 by the appellees would render the statutes unconstitutional and since the court of original jurisdiction sustained appellees' interpretation and that interpretation was sustained by the Court of Appeals of the State of New York, the conclusion is inexorable that the statutes, as interpreted, were found to be constitutional by the highest court of the State of New York. A review by this Court is therefore warranted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are the Impairment of Obligations of Contracts clause of Article I, Section 10 of the U. S. Constitution, the Due Process clauses of the Fifth Amendment to the U. S. Constitution, the Due Process Clause of Article I, Section 6 of the New York Constitution and the Legislative Power clause of Article III, Section 1 of the New York Constitution.

The statutes involved are Sections 70 (as amended by Chapter 745, Laws 1959) and 71 of the SCTA.

Said constitutional provisions and statutory provisions are set forth in Appendix A.

QUESTIONS PRESENTED

Was Special Term's construction of Sections 70 (as amended in 1959) and 71 of the SCTA, by which it held the November 16, 1964 tax sale (and subsequently issued tax deed) void by reason of the omission of the word "arrears" from the 1964/65 tax bill forwarded to appellees on December 1, 1964, violative of appellant's rights

(1) under Article 1, Section 10 of the U. S. Constitution, as an impairment of the obligations of appellant's contract made with the Suffolk County Treasurer at the tax sale, when the Treasurer sold the subject property to appellant;

(2) under the Due Process Clauses of both the U. S. Constitution (Fifth Amendment) and the New York State Constitution (Article I, Section 6), in that appellant's vested property rights were taken from it without compensation;

(3) under the Legislative Power clause of Article III, Section 1 of the New York State Constitution, in that Special Term, by its construction of the subject statutes created legislation by judicial decree, usurping the legislative power of the Legislature, to the detriment of appellant's vested property rights to the subject real property.

Neither the Appellate Division nor the Court of Appeals, which affirmed without an opinion, expressly answered the foregoing questions, their sole holding was that the earlier tax sale (and deed) was void by reason of the omission of the word "arrears" from the subsequently issued 1964/65 tax bill.

STATEMENT

As to Question (1) above:

A contract resulted at the 11/16/64 tax sale between the Suffolk County Treasurer and the appellant when the Treasurer sold the subject property to appellant *(Wood v. Lovett,* 313 US 362, 369), at which time the rights of appellant became fixed (*Clarke v. Mayor of NYC,* 111 NY 621, 623-624), vesting in appellant property rights which could not be taken from it, without due process (*Post v. Cowan,* 236 AD, 2nd Dept. (NY) 26). The construction made by Special Term of the language of §71 SCTA, under which Special Term, retroactively reached back to void an earlier valid tax sale (11/16/64), by reason of the omission of an "arrears" stamp on the 1964/65 tax bill issued December 1, 1964, impaired the obligation of appellant's November 16, 1964 contract with the Suffolk County Treasurer.

There was no issue as to the statutory duty and the power of the Suffolk County Treasurer to sell the subject property for the nonpayment of the 1963/64 2nd half taxes. Being vested with the absolute power to sell, the Treasurer, having performed every duty imposed upon him by statute, made a valid sale. Once valid, the sale remained forever valid (*Mabie v. Fuller,* 255 NY 194, 200) and "no subsequent illegal acts, either of omission or commission, can in any manner invalidate" the sale, *(Hardman v. Bowen,* 39 NY 195, 200).

Any act, from whatever source originating, to which a state gives the force of law, is a law of the state within the meaning of the contract clause of the United States Constitution (*Williams v. Bruffy,* 96 US 176, 183; 24 L. Ed. 716). Therefore, §71 SCTA, as construed by Special Term, authorizes an act (the omission of an arrears stamp) which,

when performed should invalidate a previously valid contract. Therefore, this act, when performed, is a law of New York State impairing the obligation of appellant's contract with the Treasurer, and itself invalid under Article I, Section 10 of the United States Constitution.

Under the doctrine of *Wood v. Lovett, supra:*

> "...the execution of the State's deeds to the appellants constituted the execution of the consummation of a contract, the rights arising from which are *protected from impairment* by Article I, Section 10 of the Constitution;
>
> ...any substantial alteration, by subsequent legislation, of the rights of a purchaser at a tax sale, accruing to him under the laws in force at the time of his purchase, is void as impairing the obligation of contract." (p. 369, emphasis added)

It is no less of an impairment of the obligation of the tax sale contract, if the same result (divestiture of appellant's vested contract rights) is achieved by Special Term's construction of the language of existing statutes (post 1959 § 70 and §71 SCTA). If the New York Legislature had enacted § 71 as vesting the power in the Tax Receiver to impair the obligation of appellant's tax sale contract, that enactment would have been unconstitutional by itself. Nor is the result any different, if Special Term, by its own construction of an unstated Legislative intention, attempts to do what the Legislature itself could not do, to impair the obligation of appellant's previous valid contract.

In this connection, the purpose and meaning of the 1959 Legislative amendment to § 70 SCTA embraces the thrust of appellant's position which the lower courts overruled. Under

the pre 1959 § 70 SCTA, the Treasurer's power to contract at the tax sale was conditioned upon his filing with the Supervisor, before September 1st, "a complete list of all taxes and assessments in arrears." This, the New York Court of Appeals, in *Stebila v. Mitrany,* 21 NY 2d 930, construing *both* § 70 and § 71 SCTA held to mean that the list must include (1) unpaid taxes not yet sold; and (2) unredeemed sales. In *Stebila v. Mitrany, supra* the chain of events was (a) the Treasurer's omission from his list of the unpaid taxes not yet sold, which led to (b) the omission by the Supervisor of the "arrears" stamp on the following year's assessment roll, followed by (c) the Supervisor's omission of the "arrears" stamp from the subsequently issued tax bill.

It was this Treasurer's omission of a condition precedent to a valid tax sale that made the tax sale void in *Stebila v. Mitrany, supra,* decided upon the pre 1959 § 70 SCTA. It was as if the Treasurer had omitted to advertise the tax sale, as commanded by the SCTA--he failed to perform a condition precedent to the vesting in him of the power to sell, thus the tax sale was held to be void.

However, in the instant case, the New York Court of Appeals was called upon to construe a different § 70 than the one it construed in *Stebila.* That § 70 as amended in 1959, made it the obligation of the Treasurer to include on his list *only* unredeemed sales, omitting the previously legislated duty to include unpaid taxes not yet sold. The Legislature, in 1959, had deliberately acted to remove this condition precedent to the vesting in the Treasurer of the power to sell or contract to sell. Thus, the Treasurer's "list of all property sold...remaining unredeemed." was properly filed in the instant case and the Supervisor, referring to this Treasurer's list, properly omitted the "arrears" stamp from both the 1964/65 assessment roll and tax bill. Thus the November 16, 1964 tax sale was valid and

remained valid forever.

The legislative scheme of the SCTA which the New York Court of Appeals referred to in *Matter of Gould Realty Company,* 284 NY 540, 544, functioned perfectly in this case; in that the 1965/66, 1966/67 and 1967/68 tax bills and assessment rolls (R 27) all had the proper "arrears" stamps.

The crux of appellant's position is that, in the instant case, the Treasurer had performed every condition precedent imposed upon him before the power to contract to sell at the November 16, 1964 tax sale had vested in him. Having the power to contract and having contracted to sell the subject property at the November 16, 1964 tax sale, an executed contract resulted, the obligation of which could not be impaired without violating the United States Constitution. The strained judicial construction of §§70-71 of the lower courts which resulted in the impairment of the obligation of appellant's contract is unconstitutional.

As to Question (2) above:

The issue as to whether appellant's vested rights were taken from it, without compensation, by Special Term's divestitue of appellant's title under the tax deed is a simple one. That issue hinges on whether or not a valid sale had taken place at the earlier tax sale which vested those property rights in appellant. The answer is found in a simple test, under even the lower court's holding, as to the validity of the tax sale which is: if the subsequently issued 1964/65 tax bill, issued for a different year's taxes than the one for which the sale took place, had in fact contained the "arrears" stamp, the sale would have continued to remain valid, being valid in its creation.

Yet Special Term would have us believe that a *subsequent*

act (omission of the "arrears" stamp from the 1964/65 tax bill mailed 14 days after the already valid sale had taken place) could retroactively reach back and destroy the previously valid sale. All this is performed, Special Term would have us believe, not by Legislative enactment, but by a court's construction of what was legislative intent when the Legislature enacted §71 SCTA and amended §70 SCTA in 1959.

Where two possible interpretations of a statute are available, the court will accept that which avoids constitutional doubts (*Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 NY 2d 379, 389). Here, Special Term construed Legislative intent in the enactment of the SCTA as a whole, and §71 and §70 (as amended) to achieve a result that would destroy a perfectly valid tax sale, resulting in the divestiture of the vested property rights of the appellant. Such a construction by Special Term should not be looked upon with favor.

To anticipate appellees' presentation of their argument that they were deprived of their property without due process when their property was sold for nonpayment of the 1963/64 tax and the 1964/65 assessment roll and tax bill omitted the "arrears" stamp, one must look to the SCTA for Legislative intent as to what kind of notice they were entitled to, *after the tax sale*, in order that they would receive due process.

The answer is contained in §52 SCTA which spells out how, when and who is to serve appellees with a notice to redeem from a valid tax sale; — *who* — "the county treasurer"; *when* — "at least three months before the expiration of the thirty-six months allowed for the redemption of the real estate sold."; *how* — "under the terms prescribed by the real property tax law", which is by newspaper publication of a fixed frequency.

APPENDIX B

Judgment of the Court of Appeals of the State of New York Dated March 5, 1970

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of March in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS, The HON. STANLEY H. FULD,
Chief Judge, *Presiding*
RAYMOND J. CANNON, *Clerk.*

Remittitur March 5, 1970.

---

2. No. 400. 69

William Rogers & ano., &c.,

Respondents,

vs.

Pact Realty Corp., & ors., &c.,

Appellants.

Be it Remembered, That on the 4th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Pact Realty Corp. & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Moses Krivis, & ors., their attorneys, and filed in the said Court Notices of Appeal and

return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And William Rogers & ano.,&c., the respondents in said cause, afterwards appeared in said Court of Appeals by Elwood D. Hooper, their attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Moses Krivis, of counsel for the appellant Pact Realty, and by Mr. Stanley S. Corwin, of counsel for the appellants Jacobs and County, submitted by the appellant Town, and argued by

Mr. William M. Johnson, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

was incumbent upon the lower courts to so construe § 71, in order to give meaning to the amended § 70. This the lower courts did not do when they isolated § 71 from § 70, despite the fact that in every one of the "arrears" cases decided before the instant case, these same courts construed both § 70 and § 71 together. What this means is that the lower courts in the instant case have overruled the doctrine of *Stebila v. Mitrany, supra*, under which they held that *both* § 70 and § 71 had to be construed together. However, now that the Legislature has acted to change the requirements of § 70, by its 1959 amendment, these same lower courts, reject their previously determined position and hold that *only* § 71 is to be construed and that § 70 is to be rejected, as if its original enactment in 1929 and subsequent amendment by the Legislature in 1959 had no meaning whatsoever.

Did the Legislature intend a useless act in amending § 70 in 1959? The answer is no. The lower courts' holding in the instant case is to be found in only the attempt to divest appellant of its title, in favor of the appellees, come what may. This is error and should be reversed.

Special Term's empowering of the Receiver to create his own list of "arrears" (R 141) from which he is to seek the information needed to enable him to stamp "arrears" on future issued tax bills is the creation of legislation by judicial decree. Nothing in the SCTA empowers the Receiver to perform this function. The only list of arrears provided for by the SCTA is the Treasurer's list. Only the Supervisor is empowered to stamp "arrears" on the assessment roll (§ 70) and the tax bill (§ 71 and § 11), and not the Receiver, as construed by the lower courts. Under § 11 SCTA tax bills are "made by the Supervisor" and not by the Receiver.

The substitution of Special Term's own scheme for

collection of taxes, in defiance of the Legislative scheme, is violative of Article III Section 1 of the New York State Constitution. The following judicial constructions also violate the same Article III:

(1) Creation of an additional notice to redeem from a previous valid sale, to be given by the Receiver's stamping of "arrears" on the subsequently issued 1964/65 tax bill. Only the Legislature can legislate what is a notice to redeem and who, when and how it is to be given. Special Term's empowering of the Receiver to serve such a notice of redeem by stamping "arrears" on a tax bill violently clashes with Legislative intent as found throughout the SCTA.

(2) Special Term's substitution of its own definition of "arrears" as defined by Black's Law Dictionary, (R 142) clashes with the definition enacted by the Legislature in the amended § 70, which defines "arrears" as unredeemed sales. In § 71 the Legislature referred to "said arrears" in the first sentence. That could only refer to the definition contained in the preceeding § 70 which defined "arrears" as unredeemed sales.

(3) § 70 stands in *Pari Materia* with § 71 and since it, to the exclusion of every other SCTA section, referred to the *same subject,* "arrears", these sections should have been "construed with *reference to each other* so that effect may be given to all the provisions in each..." (*51 American Jurisprudence,* Section 312), which goes on to say that "statutes should be interpreted in connection with other tax legislation." AJ goes on to state in "313. A taxing statute, like others must be read as a whole, as it stands on the statute books at its applicable date.", citing *Pacific Co. v. Johnson,* 285 US 480, 76 L Ed 893. (Emphasis supplied)

What the lower courts did in *Stebila v. Mitrany, supra,* in

construing both §70 and §71 was right since both sections stand in *Pari Materia* to each other (and to every other SCTA section). However, what these same courts decided in the instant case is wrong since they isolated §71 from §70, as amended in 1959, and every other SCTA section. The lower courts construed §71 as if it were the only section in the SCTA, dealing with "arrears" departing from its own determination in *Matter of Gould Realty Co., supra,* that the SCTA "is a *complete* and *exclusive system* for the collection of taxes and assessments by sale in Suffolk County" (emphasis added). In effect, the Court of Appeals held here that §71 is *not a part* of the complete and exclusive system which is the SCTA, but that it stands alone, as if it had been enacted separately and apart from the rest of the SCTA. This also was creation of legislation by judicial decree, through construction.

CONCLUSION

For the reasons stated, the federal and state constitutional questions brought up by this appeal are substantial and of pressing importance to the public. Probable jurisdiction should be noted in this case so that the questions may be resolved after plenary consideration of the case on the merits.

Respectfully submitted,

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APPENDIX A
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

CONSTITUTION OF THE UNITED STATES

ARTICLE I, Sec. 10. Restrictions upon powers of states (first paragraph)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

AMENDMENT (V) Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE I, Sec. 6 (last paragraph)

No person shall be deprived of life, liberty or property without due process of law.

§ 70. County treasurer to furnish supervisors with list of arrears. The county treasurer shall make a complete list of all taxes and assesments in arrears and shall file with each town supervisor, on or before the first day of September of each year, a list of all arrears of taxes and assessments on property in such town. All sales of property for nonpayment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 52, Laws of 1929, in effect March 18, 1929)

§ 71. Bill of Taxes to Show Arrears. There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land "Arrears" and at the bottom of said bill shall be printed "Whenever any tax or assessment shall remain unpaid for six months from February first, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer." (Added by Chapter 152, Laws of 1929, in effect March 18, 1929.)

§ 70. *County Treasurer to Furnish Supervisors with List of Arrears.* Following each tax sale the county treasurer shall make and shall file with each town supervisor, on or before the first

day of September of each year, a list of all property sold for unpaid taxes and assessments in such town remaining unredeemed. All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 745, Laws of 1959, in effect April 23, 1959)

§ *11. Extension of Taxes by Supervisor.* The supervisor of each town shall on or before the first day of December in each year extend or cause to be extended upon the assessment roll of the town the taxes, assessments or other charges to be levied and assessed against the taxable persons and property on said roll as fixed and determined by the board of supervisors or other competent authority; and the cost thereof shall be a town charge. Such extension shall be made in totals or items as shall be requisite to conform to the form of the assessment roll as prescribed by the board of supervisors as hereinbefore provided, and there shall be inserted in the roll a tabular statement of the total assessed valuation in each tax district, the amount of taxes and assessments to be raised and the tax rate therein. Such tabular statement shall also be printed or stamped in full upon the tax bills or on separate sheets as the board of supervisors may direct, and shall be distributed by the receiver to the taxpayers with the tax bills. In any town having one or more mechanical tax extension machines, the tax bills may be made by the supervisor at the time of extending taxes, assessments and other charges on the tax roll of the town. (Chapter 311, Laws of 1920, in effect April 22, 1920; amended by Chapter

104, Laws of 1921, in effect March 18, 1921; amended by Chapter 187, Laws of 1931, in effect March 20, 1931; and amended by Chapter 57, Laws of 1948, in effect March 1, 1948.)

§52. Notice of Unredeemed Real Estate: Notice to Redeem. 1. Notice of unredeemed real estate shall be given and published by the county treasurer at least three months before the expiration of the thirty-six months allowed for the redemption of real estate sold by him for taxes and assessments, the last publication to be at least six weeks before the expiration of such thirty-six months, and in all other respects shall be as provided in the real property tax law.

2. Whenever by any provision of the real property tax law it is provided that any notice may or shall be given or filed within a period measured by reference to the time allowed for the redemption of real estate sold for taxes and assessments or by reference to the time of the sale, such provisions shall be construed as referring to the thirty-six month period for redemption herein provided as respects such sales in Suffolk county. Notices required to be served upon occupants of real estate or other pursuant to the real property tax law in relation to the redemption of such real estate from tax sales shall state that such real estate may be redeemed upon the payment of the moneys specified by law to be paid upon the redemption of such real estate.

3. Notice shall be given by the purchaser of any real estate sold for taxes under the provisions of this act in the manner and under the terms prescribed by the real property tax law and notice to redeem from any such sale and notice to occupants shall be made and given as provided by such law. The provisions of the real property tax law relating to redemption shall continue to apply to the matters covered thereby, except as

herein otherwise provided, and except that the rate of interest to be paid upon any redemption shall be at the rates fixed by this act. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 960, Laws of 1958, in effect October 1, 1959.)

28 United States Code, Section 1257 (2)

Final judgment or decree rendered by the highest court of a State, in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By Appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

As shown above, the tax sale was valid when made. A valid tax sale can not be wiped out, except by proper redemption. All that appellees were entitled to receive in the form of a redemption notice is specifically prescribed by §52 SCTA. Special Term, in the instant case, prescribed, by its own construction of §71 (out of context with the amended §70) and the rest of the SCTA, including §52, that appellees were entitled to an *additional* notice to redeem, in the form of an "arrears" stamp on the 1964/65 tax bill, which by §23 SCTA was required to be mailed and was mailed December 1, 1964, 14 days after the earlier, validly held tax sale.

Appellee's due process did not include an "arrears" stamp on the 1964/65 tax bill, in the face of the 1959 amendment to §70 which precluded the inclusion in the Treasurer's list of the unpaid 1963/64 tax which had not yet been sold, on September 1, 1964, (before the sale) at which time §70 mandated the Treasurer to furnish a list of unredeemed sales to the Supervisor of Babylon.

As to Question (3) above:

The power to enact legislation rests with the New York Legislature. Courts cannot, under the guise of judicial construction, create legislation. Yet, that is exactly what Special Term attempted to do herein.

The Legislature created, in the SCTA, "a complete and exclusive system for the collection of taxes and assessments by sale in Suffolk County" (*Matter of Gould Realty Co.*, 284 NY 540, 544). Before the 1959 amendment to §70, that system of collection of taxes provided:

(1) "COUNTY TREASURER TO FURNISH SUPERVISORS WITH LIST OF ARREARS", before September 1st, to include unpaid taxes not yet sold and unredeemed sales.

(2) Upon receiving that list, the "Supervisor...shall thereupon place in a column...(on the assessment roll-added)...the word "arrears" after the description of each parcel of land as shown on the..." Treasurer's list.

(3) Thereafter, the Supervisor (§ 11 SCTA), who makes up the tax bills (and not the Receiver, as claimed by Special Term) stamps "arrears" on the tax bill for the following year's taxes, which tax bill is to be mailed December 1st of that same year.

Under this Legislative scheme, had this tax sale been held before 1959, appellees would have been entitled to receive the later issued tax bill with the "arrears" stamp thereon *(Stebila v. Mitrany,* 21 NY 2d 930; *Erlwein v. Patchogue Homes,* 43 M2d (NY) 707; *Proschuk v. Erlwein,* 22 AD 2d 1018.) Under the pre 1959 § 70, a condition precedent to the vesting in the Treasurer of the power to sell was that he, the Treasurer, include by September 1st, before the sale, in his list filed with the Supervisor, the unpaid tax not yet sold. Thus, under the pre 1959 § 70, the power to sell might not have vested in the Treasurer, when he failed to include in his list the unpaid tax not yet sold, filed with the Supervisor before September 1st. That affected the due process to which the taxpayer was entitled.

However, in 1959, § 70 was amended by Chapter 745, Laws of 1959, to exclude from the Treasurer's list the unpaid tax not yet sold and to limit his list to include *only* unredeemed sales. The Legislature deliberately, in 1959, removed from a statutory duty previously imposed on the Treasurer, the obligation to include in his list unpaid taxes not yet sold.

Since the subject tax sale, destroyed by Special Term, took place after the enactment of the 1959 amendment to § 70; it

cording to law, and which record now remains in the said
preme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, March 5, 1970.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon

Clerk.

APPENDIX C
Memorandum Opinion of the Appellate Division Second Department

WILLIAM ROGERS, et al., Respondents, v. PACT REALTY CORP., et al., Appellants.—Judgment of the Supreme Court, Suffolk County, dated January 23, 1969, modified, on the law, by inserting in the second ordering paragraph, following the word "answers", the words "to the amended complaint"; and by adding a paragraph severing the cross-claims of defendant Pact Realty Corporation against the other defendants. As so modified, judgment affirmed, with one bill of $10 costs and disbursements to respondents, jointly against appellants filing separate briefs. In our opinion, the tax sale and the tax deed to defendant Pact Realty Corp., based on default in paying the second half of the 1963-64 taxes, were invalid because of the failure to have the word "Arrears" noted on the 1964-65 tax bill as required by section 71 of the Suffolk County Tax Act. (See *Hutch v. Platt,* 32 A D 2d 925.) The instant case does not involve the validity of a tax or assessment and the provisions of section 68 of the Suffolk County Tax Act are therefore inapplicable. We find no grounds for disturbing the Special Term's determination, except as herein modified, in any of defendants' other contentions. The judgment is modified to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term. Christ, Acting P.J., Brennan, Rabin, Munder and Martuscello, JJ., concur.

APPENDIX D

Memorandum Opinion of Mr. Justice William R. Geiler Justice of the Supreme Court, Suffolk County, State of New York

MEMORANDUM
Motion No. 2748
Ind. No. 164, 335
9/3/68

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM. PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS, as County Treasurer of the COUNTY OF SUFFOLK, and the COUNTY OF SUFFOLK,

Defendants.

By GEILER J. S. C.
Dated November 25, 1968

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Motion by defendant Pact Realty Corp. (hereinafter referred to as Pact) for summary judgment dismissing the complaint and cross motion by plaintiffs for summary judgment.

Plaintiffs instituted this action pursuant to Article 15 of the Real Property Law of the State of New York, to set aside a tax deed executed and delivered by defendant Treasurer of the County of Suffolk (hereinafter referred to as Treasurer) to Pact.

Plaintiffs admittedly failed to pay the second half of the 1963/64 taxes on their property located in the Town of Babylon, County of Suffolk. Pact purchased the subject property at a tax sale on November 16, 1964. The property was not redeemed within the 36 month redemption period and the Treasurer delivered a tax deed to Pact on January 28, 1968. Pact recorded the deed on January 31, 1968.

The parties herein have stipulated to the following facts:

1. The tax bill for 1964/65 and the assessment roll for 1964/65 did not have the word "arrears" stamped thereon.

2. The "County Treasurer's Notice" was not printed on the bottom of the face side of the tax bills from 1963/64 through 1967/68 but was printed on the reverse side of said tax bills.

3. The "County Treasurer's Notice" provides:

> "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the

advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

4. All of the above mentioned tax bills did not have a ruled column for arrears printed thereon.

Plaintiffs contend that the tax sale herein was void because the provisions of Section 71 of the Suffolk County Tax Act (hereinafter referred to as S.C.T.A.) were not strictly complied with by the taxing authorities. They especially argue that Section 71 of the S.C.T.A. required that arrears be noted on the 1964/65 tax bill and that the "County Treasurer's Notice" must be printed on the bottom of the front side of the tax bill.

Pact maintains that the plaintiffs have given an erroneous interpretation to Section 70 of the S.C.T.A. and therefore their contentions are without merit. The tax sale purchaser specifically asserts that the word "arrears" was not required to be noted on the 1964/65 tax bill because of the "operation of Section 70 of the S.C.T.A. as amended in 1959." Pact also argues that the printing of the "County Treasurer's Notice" on the bottom of the reverse side of the tax bill complies with the the requirements of Section 71 of the S.C.T.A.

Furthermore, Pact contends that plaintiffs' action is barred by the Statute of Limitations as contained in Section 63 of the S.C.T.A.

Section 71 of the S.C.T.A. provides:

"SEC. 71. BILL OF TAXES TO SHOW ARREARS.
There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land

"Arrears" and at the bottom of said bill printed "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

What was the purpose of the Legislature in enacting Section 71 of the S.C.T.A.? Why did they so minutely describe what must be contained in each tax bill? Why is the tax bill so important?

The tax bill is the only actual or personal notice a property owner receives with reference to the taxable status of his property in Suffolk County. He will receive no other notice of the taxable status of his property unless the property is to be sold for unpaid taxes due thereon. Then the only notice he receives is that of the sale and this notice is not given personally but only by publication as prescribed by Sections 42 and 43 of the S.C.T.A.

The Legislature, cognizant of these facts, wanted to make certain that the property owner was made aware of any possible loss of his property because of unpaid taxes. They wanted this notice to be given in such a manner so as to alert not only the knowledgeable but also the uninformed property owner.

What was the best way to accomplish their purpose? How could they make even the most unsuspecting property owner aware of any tax monies due and owing?

The Legislature came to the conclusion that their purpose could best be achieved by mandating the format of the tax bill which every property owner receives. They therefore

determined that the front of all tax bills in Suffolk County should contain certain items from which a property owner, regardless of his knowledgeability of real estate taxes, could determine, at a glance, if there were any tax arrears and the title of the County official from whom the property owner could obtain such vital information. Hence, Section 71 was enacted and has not been amended to date.

The 1963/64 tax bill admittedly does not conform to the exact provisions of Section 71 of the S.C.T.A. Must there be strict compliance with Section 71? Is the failure to follow Section 71 fatal to a tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila v. Mitrany*, N.Y.L.J., December 24, 1965, P. 10 Col. 5, affirmed by the Court of Appeals 21 N.Y.2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However, sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note 'arrears' on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court is guided by decisional law contained in the case of Ierna v. Maranzano, 211 N.Y.S.2d 616, Erlwein v. Patchogué Homes Corp., 43 Misc.2d 707, 252 N.Y.S.2d 220 and Proschieck v. Erlwein, N.Y.L.J. 7/31/64, p. 8 col. 5, Aff'd. 22 A.D.2d 1018, leave to appeal denied 15 N.Y.2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission

of the word "Arrears" on a subsequent tax bill, held that the provisions of Section 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance."

Pact maintains that neither *Stebila, supra,* nor the "arrears" cases cited therein are determinative of the issues herein because these cases were decided prior to the 1959 amendment of Section 70 S.C.T.A. The tax sale purchaser contends that Section 70 of the S.C.T.A., as amended in 1959, controls Section 71 S.C.T.A. and by its operation "arrears" was not required to be noted on the 1964/65 tax bill.

Section 70 of the S.C.T.A. as amended in 1959 reads as follows:

"§ 70. County treasurer to furnish supervisors with list of arrears. *Following each tax sale the* county treasurer shall make a [complete list of all taxes and assesments in arrears] and shall file with each town supervisor, on or before the first day of September of each year, a list of all [arrears] of *property sold for unpaid* taxes and assessments on property in such town *remaining unredeemed.* All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list."

(NOTE: Changes or additions in text are indicated by *italics,* deletions by brackets).

Pact's position is based on the following syllogism:

1. Plaintiffs' property was sold in November, 1964.

2. The County Treasurer, by virtue of Section 70 S.C.T.A., was not required to file with the Town of Babylon a list, showing plaintiffs' property sold for unpaid taxes, until September 1, 1965.

3. Section 70 S.C.T.A. states that "all sales of property for non payment of such taxes or assessments shall be considered arrears." [Note this provision was also in Section 70 prior to 1959 Amendment]

4. The meaning of arrears is limited to property sold for non-payment of taxes.

5. Arrears did not exist until after the sale of plaintiffs' property.

6. The Town of Babylon did not receive the list of arrears (property sold for unpaid taxes) from the County Treasurer until after the tax bills for the year 1964/65 were sent out in December 1965.

7. Thus, "arrears" was not required to be noted on the 1964/65 tax bill.

Plaintiffs' position is untenable. It is based on a definition of "arrears" which has been refuted by Justice Ritchie of this Court in the case of *Erlwein v. Patchogue Homes Corp.*, 252 N.Y.S.2d 220, at page 223:

"*** the interpretation of the word "Arrears", as included

in the Suffolk County Tax Act means only those arrears that have been established by a sale of the property for unpaid taxes.

The Court does not agree with plaintiffs' contention."

What if no one purchased a particular piece of property offered at a tax sale because of non-payment of taxes? Does this mean, because the property is not sold, that there are no arrears? Doesn't the tax receiver, in the first instance, determine if there are arrears?

Thus it is clear that "arrears" was never intended to be limited to mean property sold for unpaid taxes. The only reasonable definition of "arrears" is its ordinary usage as defined in Black's Law Dictionary, 4th Edition, at page 140: "Money unpaid at due time."

This Court does not agree with Pact's contention that the Legislature modified or changed the mandatory provisions of Section 71 S.C.T.A. by the amendment to Section 70 S.C.T.A.

McKinney's Statutes, Section 73 states at page 110:

"The Constitution of this State vests the Legislative power in the Senate and Assembly and that the Courts may not divest or usurp that power has been announced so frequently and in such varying language to defy repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare and enforce the law, not to make it. No matter what disastrous consequences may result from following the expressed intent of the Legislature the Judiciary cannot avoid its duty*** They may not by interpretation add to or take from a clear and positive legislative mandate

or substitute that which must be brought into existence by legislative mandate***but public policy or opinion should not sway the judiciary to read into a statute that which the Legislature might have inserted but did not.***"

The Legislature had an opportunity to expressly change or modify Section 71 S.C.T.A. They chose not to do so. This Court will not change Section 71 S.C.T.A. by implication in view of the fact that the Legislature, if it intended to change Section 71 S.C.T.A.; refused to expressly modify or change the mandatory requirements of said section.

Furthermore, an examination of Sections 70 and 71 of the S.C.T.A. indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at Page 412:

"It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arises. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by a fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subjects."

Defendants are also erroneous in their contention that plaintiffs' action is barred by Section 63 S.C.T.A. Section 63 basically provides that an action to attack the validity of an

assessment must be commenced within two years from the date of the receipt of the warrant by the receiver of taxes.

The plaintiffs are not attacking the validity of the assessment. They admit that the assessment is valid and thus Section 63 has no application herein.

The only section of the S.C.T.A. which is germane herein with reference to a statute of limitation period is 53. However, this action has been brought within the statutory period provided therein and therefore Section 53 is not an issue.

The Court abhors a forfeiture. It will not permit the plaintiffs, who have timely acted, to forfeit their real property because of the failure of the taxing authorities to comply with the provisions of Section 71 S.C.T.A.

The tax sale and deed are hereby declared invalid.

Plaintiffs' cross motion is granted and defendants' motion is denied.

Settle judgment.

WILLIAM R. GEILER

J. S. C.

APPENDIX E

Memorandum Amending Memorandum of November 25, 1968

MEMORANDUM

Motion No. 2748 9-3-68
Index No. 164, 335

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS, as County Treasurer of the COUNTY OF SUFFOLK, and the COUNTY OF SUFFOLK,

Defendants.

By GEILER, J. S. C.
Dated January 13, 1969

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The Court, on its own motion, amends the decision dated November 25, 1968 to correct a typographical error on page 5 of the decision. The first sentence on page 5 shall read as follows:

"Pact's position is untenable..."

WILLIAM R. GEILER

J. S. C.

SU

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 24 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 220

CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the County of Suffolk of the State of New York,

Appellants,

v.

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORP. and TOWN OF BABYLON, of the State of New York,

Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 221

WILLIAM ROGERS and ROSE ROGERS, his wife,

Appellees,

v.

PACT REALTY CORP.,

Appellant,

TOWN OF BABYLON of the State of New York,

CHESTER JACOBS, as County Treasurer of the State of New York, and the County of Suffolk of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 220

CHESTER F. JACOBS, as County Treasurer of the County of Suffolk and the County of Suffolk of the State of New York,

Appellants,

v.

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORP. and TOWN OF BABYLON, of the State of New York,

Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 221

WILLIAM ROGERS and ROSE ROGERS, his wife,

Appellees,

v.

PACT REALTY CORP.,

Appellant,

TOWN OF BABYLON of the State of New York,

CHESTER JACOBS, as County Treasurer of the State of New York, and the County of Suffolk of the State of New York,

Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM

The foregoing appeal (Case #220 October Term, 1970) of the appellant Chester F. Jacobs, as County Treasurer

of the County of Suffolk and the appellant the County Treasurer of the County of Suffolk, and the County of Suffolk of the State of New York, from the judgment (Order and Remittitur) of the Court of Appeals of the State of New York entered in the Office of the said Court of Appeals on March 5th, 1970 will be hereafter known as the "County Appeal".

The foregoing appeal (Case #221 October Term, 1970) of the appellant, Pact Realty Corp. from the same judgment as aforesaid will be hereafter known as the "Pact Appeal".

Because the foregoing appeals are taken from the same judgment this single record is used, pursuant to Rule 12 Par. 5 of the Rules of this Court.

The Town of Babylon of the State of New York as defendant-appellant in the New York State Court of Appeals, designated as an appellee in both of the aforesaid "appeals", has *not* joined in the foregoing "appeals" to this court.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Motion to Dismiss or Affirm

Appellees William Rogers and Rose Rogers his wife, hereafter known as "Appellees Rogers" pursuant to the provisions of Rule 16 of the Revised Rules of this court "Move to Dismiss" both the foregoing "Appeals to this Court" (County #220) and the ("Pact Appeal" #221) from the same Judgment (Order and Remittitur) of the Court of Appeals of the State of New York entered March 5th, 1970 which said Judgment, unanimously affirmed an Order of the Appellate Division of the Supreme Court,

Second Judicial Department, which said Order, modified on the law, and as so modified, unanimously affirmed, the Judgment of the Supreme Court, Special Term, of the Supreme Court of the County of Suffolk of the State of New York, entered January 23rd, 1968, on the grounds that this court lacks jurisdiction under the provisions of 28 U.S.C.A. 1257(2) on direct appeal to this court, to review the foregoing "Final Judgment" of the Court of Appeals of the State of New York, because

(A) The record in this case (Appellants Joint Appendix) stipulated as the whole record to be considered by the Court of Appeals (R 147) and the Order and the Judgment on the Remittitur entered and filed in the Office of the Clerk of the County of Suffolk of the State of New York on April 15th, 1970 (all of which now constitutes the entire record on these Appeals clearly shows to this Court

(a-1) That neither the aforesaid "County Appeal" nor the aforesaid "Pact Appeal" from the same judgment of the Court of Appeals of the State of New York have been taken in conformity to Statute or to these rules.

(B) The record in this case also clearly shows that at no time have the appellants in both of the aforesaid "Appeals", ever attacked or brought into question the *Validity* of any *Statute* of the State of New York, either in the State Courts, or on these "Appeals" as required on direct appeal to this Court, for this court to obtain jurisdiction to review the aforesaid Judgment of the Court of Appeals of the State of New York.

(C) The failure of the appellants in both the "County Appeal" and in the "Pact Appeal" to "attack" or "draw into question" the Validity of Section 71 of Chapter 152 of the Laws of 1929 (New York) which *entire statute* is a part of the Suffolk County Tax Act (hereafter referred to as S.C.T.A.) by a subsequent Legislative Act either in the New York Courts or on these appeals shows a com-

plete failure of Jurisdiction of this Court to review the aforesaid Judgment of the New York Court of Appeals, on direct appeal to this Court.

(D) The failure of the appellants in the "County Appeal" to raise or plead "As an Affirmative Defense" any "Federal Questions" in their pleadings in the Court of New York State, as required by section 3018 (b) of the State of New York, Civil Practice Law & Rules, in the Courts of the State of New York (Appendix A) precludes, said appellants in the "County Appeal" from raising any "Federal Questions" for the first time on their appeals to this Court.

(E) The Federal Questions raised and pleaded by the appellant in the "Pact Appeal" as "A Fourth Affirmative Defense" in its answer to the Amended Complaint of the plaintiffs therein in the State Courts (appellees on these Appeals) and sought to be reviewed herein is insufficient as a "Matter of Law" for the reason that said "Affirmative Defense" as pleaded in the New York State Courts are mere "Conclusions of Law" and as so pleaded in its answer to the Amended Complaint in the New York State Courts does not constitute a valid affirmative defense under New York State Laws.

(F) The record also shows that no Federal Questions were expressly passed upon in any of the New York State Court Decisions, including the New York Court of Appeals in this case.

(G) The construction of Section 71 S.C.T.A. a valid tax statute of the State of New York as determined by Mr. Justice Geiler of the Supreme Court, Suffolk County (R 131-146) did not impair the obligation of the alleged tax sale contract made by County Treasurer of Suffolk County and Pact Realty Corp (appellants herein) for the sale and purchase of the premises herein allegedly sold for second half of 1963/1964 taxes for the reason that a

judicial impairment of a contract is not within the provisions of article 1, section 10, of the United States Constitution.

(H) An examination of the record in this case clearly shows that all of the decisions, judgments or orders of the New York Courts in this case, including the aforesaid Judgment of the New York Court of Appeals rests on an adequate non-federal basis, and that said New York Courts decided this case, entirely upon the construction of New York Statutes; decisions interpreting and construing said Statutes and that it was not necessary for said courts to consider or pass upon any "Federal Questions" to arrive at its decision in this case.

(I) That neither in the "County Appeal," nor in the "Pact Appeal" have the said appellants in their respective jurisdictional statements shown or raised any "Federal Questions" which would give this court jurisdiction to review the aforesaid Final Judgment of the Court of Appeals of the State of New York.

Citation to Opinions Below

The opinions of the Supreme Court, Suffolk County (Mr. Justice Geiler) is not reported (RA131-A146). The opinions of the Appellate Division, Second Department, is reported in 32 A. D. 2d at 929. The decision of the Court of Appeals of the State of New York is reported in 26 N. Y. 2nd 872.

Questions Presented

1. Was there a valid tax sale contract of sale entered into at the time of the alleged tax sale (On November 16th,

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* Numbers in parentheses, unless otherwise indicated refer to pages in the Record is (RA 131-A146) (Appellants Joint Appendix).

1964) of the Real Property which is the subject of this action by the appellant, the County Treasurer of Suffolk County acting for and on behalf of the appellant, the County of Suffolk, of the State of New York (appellants in Case #220) and the appellant Pact Realty Corp., the tax sale purchaser (Case #221)?

2. Is Section 71 of the Suffolk County Tax Act a Valid Tax Statute of the County of Suffolk of the State of New York?

3. Does the Judgment (Order and Remittitur) of the Court of Appeals of the State of New York entered in said Court on March 5, 1970, impair the Obligation of the alleged tax sale contract as said impairment, is defined in Article 1, Section 10 of the United States Constitution?

4. Did the Taxing Authorities of the County of Suffolk of the State of New York and the Town of Babylon of the State of New York strictly perform the duties imposed upon them by Statute, to be performed subsequent to November 16, 1964, and fulfill the obligations imposed upon them by the terms of the alleged aforesaid contract for the tax sale of the premises which is the subject of this Action?

5. Was there a valid statutory notice pursuant to the "mandatory" provisions of Section 52 of the Suffolk County Tax Act (Appendix A) to redeem the real property which is the subject of this Action, given to the fee owners, the "appellees Rogers" herein prior to the execution and delivery of the Tax Deed by the County Treasurer of Suffolk County, New York to the "Pact Realty Corp.", appellants herein as claimed by the appellant "Pact Realty Corp.", in its Jurisdictional Statement (pp. 12 and 13).

6. Did the failure of the taxing authorities of the County of Suffolk of the State of New York and the town of

Babylon of the State of New York (which said defendant in the State Courts, has not appealed to this Court) to strictly comply with the "Mandatory" and "Jurisdictional" requirements of Sections 71, 70, 75 and 52 of the Suffolk County Tax Act, nullify the "alleged contract of Sale" heretofore set forth?

7. Did the admitted failure of the Taxing Authorities of the County of Suffolk and the Town of Babylon of the State of New York to comply with the foregoing provisions of the Suffolk County Tax Act constitute an impairment of said contract, if said contract exists, as said impairment is defined in Article I, Section 10 of the United States Constitution?

Statement of the Case

This action was originally brought in the Supreme Court of the County of Suffolk of the State of New York by the plaintiffs therein (William Rogers and Rose Rogers, his wife, the appellees in both of the appeals herein) against the defendants Pact Realty Corp. (one of the appellants herein), Town of Babylon of the State of New York (which said defendant has not appealed to this Court), and Chester F. Jacobs, as County Treasurer of the County of Suffolk, appellant herein, and the County of Suffolk of the State of New York, an appellant herein pursuant to the provisions of Article 15 of the Real Property Actions and Proceedings Law Sec. 1501 *et seq.* for the purpose of the determination of the claims to the real property in which is the subject of this action. The amended complaint of the plaintiff in said action is in the record (RA31-A45).

After the joinder of issue, a motion was made by the defendant, in said action, Pact Realty Corp., which was joined in by the other defendants in said action, to dismiss the complaint and the amended complaint of the plaintiffs pursuant to Section 3212 of Civil Practice Law and Rules

(N. Y.) and for Summary Judgment (R 18-19). The plaintiff in said Action (Rogers) the appellees in the appeal herein, made a Cross Motion to strike out the answers of the defendants and for Summary Judgment pursuant to Sec. 2215 of the Civil Practice Law and Rules (N. Y.) (RA92-A94).

The joint motions were argued before Mr. Justice William R. Geiler of the Supreme Court of the State of New York on November 25, 1968 (R 131-145) and as corrected on January 13, 1969 (R 146) Mr. Justice Geiler, rendered his decisions, granting the Cross Motion of the Plaintiffs therein (the appellees) "Rogers" in the appeals herein, for Summary Judgment, on the ground that the tax sale, and tax deed were invalid for the failure of the taxing authorities to comply with the mandatory and jurisdictional provisions of Section 71 S.C.T.A., and denied defendants' motion to dismiss the complaint, and the amended complaint of the plaintiffs.

All of the defendants appealed to the Appellate Division of the Supreme Court, Second Department of the State of New York, and on July 2nd, 1959, an Order was entered by said Court (R 152-153) which said Order unanimously modified, on the law, by inserting in the second ordering paragraph, following the word "answers" the words

> "to the amended complaint; and *by adding a paragraph severing the cross claims of defendant Pact Realty Corporation, against the other defendants*, and as so modified said judgment is hereby unanimously affirmed" (*emphasis supplied*).

The defendants-appellants in the Appellate Division as aforesaid because of the modification appealed to the Court of Appeals of the State of New York, as a matter of right (RA148-149 Pact) (RA150 Town of Babylon) (RA151 County).

The case was argued before the Court of Appeals on February 17, 1970, and on March 5th, 1970, the order of the

Appellate Division appealed from was unanimously affirmed, with costs, no opinion.

The "Record on Appeal" and the Judgment (Order and Remittitur) was filed in the Office of the Clerk of County of Suffolk of the State of New York on April 3, 1970.

On April 15, 1970, the Order on the Remittitur of the Supreme Court of the County of Suffolk, pursuant to the order of the Court of Appeals of March 5th, 1970, was entered and filed in the Office of the Clerk of the County of Suffolk, and on the same day a Judgment on said Order, was also entered and filed in the Office of the Clerk of the County of Suffolk.

By the terms of the "Order on the Remittitur" the Cross-Claims of the Defendant Pact Realty Corp. (appellant herein Case #221) against the Town of Babylon of the State of New York was severed by the "Third" Ordering Paragraph (p. 2) and the Cross-Claim of the Defendant Pact Realty Corp., against appellant herein Chester F. Jacobs, as County Treasurer of Suffolk County and the appellant herein (Case #220) was severed by the "Fourth" Ordering Paragraph of Said Order. (p. 2).

In 32 A. D. 2d 929, the Appellate Division of the Supreme Court, Second Judicial Department of the State of New York, in this case, modified the judgment of Special Term, as heretofore set forth,

> "to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term."

The Severance of the cross-claims, has been accomplished by the terms of the aforesaid Order and Judgment on the Remittitur of the Supreme Court of the County of Suffolk entered and filed in the Office of the Clerk of the County of Suffolk on April 15, 1970, but no affirmative action has been taken by any of the parties in the Severed Cross Claims

(by both of the appellants herein) to seek a determination of their rights as ordered by the Appellate Division and the Court of Appeals of the State of New York, *supra*.

ARGUMENT

POINT I

The appeals from the Judgment (Order and of the Court of Appeals of the State of New York entered March 5, 1970), by the appellants herein have not been taken in conformity with the Provisions of Title 28 U.S.C.A. 1257(2).

The appeals in the case before this Court (County Appeal Case #220) and (Pact Appeal Case #221) October Term, 1970 have been taken to this Court from the Judgment of the Court of Appeals of the State of New York, on direct appeal, pursuant to the provisions of Title 28 U.S.C.A. 1257(2) which is the only Federal Statute, that permits an appellant, to appeal to this Court "on *direct appeal*" from a final judgment of the highest appellate court of a state.

The foregoing "Statute", provides in part that

> "Final Judgments or decrees rendered by the highest court of a state may be reviewed by the Supreme Court as follows . . . (2) 'By appeal, where is *drawn* into *question* the *validity* of a *statute* of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.'
>
> "The aforesaid provisions of said statute are *strictly construed* by this Court, for the reason that this Court has jurisdiction *only* if there is *drawn* into question the validity of a *statute* of any *state* on the ground of its being repugnant to the Constitution,

treaties or laws of the United States and the decision is in favor of its validity."

The appellants in both the "County Appeal" and in the "Pact Appeal", now take the position that Mr. Justice Geiler, by his decisions in the Supreme Court, Suffolk County, New York, which are not officially reported (RA13I-A145) corrected decision (RA146) and the judgment entered thereon (RA11-A17) impaired the obligation of an alleged tax sale contract, alleged to have been entered into on November 16, 1964 by the County Treasurer of Suffolk County on behalf of the County of Suffolk (appellants in the County Appeal) and Pact Realty Corp. (Appellant in the Pact Appeal) for the sale and purchase of the real property sold at the tax sale for the tax year 1963/1964.

The appellant in the "Pact Appeal" (pp. 8 and 9) of their jurisdictional statement admit that there is *no impairment* of the aforesaid contract by any subsequent New York State *legislation* under the Doctrine of *Wood* v. *Lovett,* 313 U. S. 362, 369, nevertheless, it contends at p. 9 that

> "It is no less an impairment of the obligation of the tax sale contract, if the same result (divestiture of appellant's contract rights) is achieved by Special Term's construction of *existing* statutes." (Post 1959 § 70 and § 71 SCTA)

The appellants in the "County Appeal" also take the same position in their jurisdictional statement by their statement on p. 8:

> "The contracting parties are subject to the *law* in force at the time, and it is not contended *any* subsequent *legislative* action *impaired* the contract, and on pp. 9 and 10 where it is further stated
>
> 'It is submitted the New York Court of Appeals erroneously applies *law* to a statute so that it re-

> sults in the unconstitutional impairment of a contract, and by cancelling a recorded deed; deprives a party of property without due process of law.' "

It is well settled law, that where the contract clause in U.S.C.A. Const. Article 1, Sec. 10, cl. 1, was not relied on in proceeding in State Court, question thereunder could not be presented on appeal to the United States Supreme Court, *Gibbs* v. *Zimmerman,* S. C. 1933, 54 S. Ct. 140, 290 U. S. 326, 78 L. Ed. 342. In the case of *Cardinale* v. *Louisiana,* decided April 1, 1969, 394 U. S. 437, 22 L. ed. 2nd 398; 89 S. Ct. 1162, this court held in 394 U. S. 437, 438:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, § 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails' 10 Pet 368, 391 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U. S. 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 U. S. 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 U. S. 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 U. S. 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v. Des Moines, 173

U. S. 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)."

The court further stated at page 439:

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgment of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U. S. 92, 17 L Ed 2nd 189, 87 S Ct 252."

The record in this case (Appellants' Joint Appendix) shows that at no time in their pleadings (verified answer RA71-A73), to the amended complaint of the Plaintiffs in this action (RA31-A52 with exhibits) or in their verified answer to the cross claim of the appellant Pact Realty Corp., have the appellants in the "County Appeal" ever raised or relied upon any "federal questions" in the state courts.

That as a result, as will be pointed out in Point III, a federal question cannot be raised for the first time on this appeal (County Appeal).

That "Pact" in its answer to the amended complaint, attempted to raise a federal question in general terms

(RA59-A60) that

1. Any nullification of the deed of the defendant Pact Realty Corp. * * *, would deprive the defendant Pact Realty Corp. of its constitutional rights.

(a) Article 1, Sec. 10 of the United States Constitution

(b) Amendment V of the United States Constitution.

In the case of *Stembridge* v. *Georgia,* 343 U. S. 541, 96 L. ed. 1130, 72 S. Ct. 834, in which case the 14th Amendment to the Constitution of the United States (Code Sec. 1-815), guaranteeing to all persons equal protection of the law was claimed to have been violated, the Court stated (343 U. S. 541, 547):

"It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. Beckmann v. Atlantic Ref. Co., 181 Ga. 456, 182 SE 595. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. Persons v. Lea, 207 Ga. 384, 61 SE 2d 832.

At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. Hedgebeth v. North Carolina, 334 U. S. 806, 92 L ed 1739, 68 S Ct 1185; and other cases cited therein."

The appellant "Pact" in the "Pact Appeal" also rely upon the case of *Williams* v. *Bruffy,* 96 U. S. 176, 183, 24 L. Ed. 716 as authority for its contention that "any act, from whatever source originating, to which a state gives the *force* of law, is a law of the state within the meaning of the contract clause of the United States Constitution" (J. S. p. 8).

This Court has held that "The policy against premature constitutional adjudications demands that any doubts in maintaining appellants' burden of establishing United States Supreme Court's jurisdiction be resolved against jurisdiction", *Republic Natural Gas Co.* v. *State of Oklahoma,* Ok. 1948, 68 S. Ct. 972, 334 U. S. 62, 92 L. ed. 1212. See also *Department of Mental Hygiene of Cal.* (1965), 85 S. Ct. 871, 380 U. S. 194, 13 L. Ed. 2d 753; *Gorman* v. *Washington University,* Mo. 1942, 62 S Ct. 962, 316 U. S. 98, 86 L. ed 1300, rehearing denied 62 S. Ct. 1272, 316 U. S. 711, 86 L. Ed. 1777.

In the case of *King Mfg. Co.* v. *Augusta,* 48 S. Ct. 489, 277 U. S. 100, 72 L. ed. 801, Mr. Justice Van Devanter, delivered the opinion of this Court and in 277 U. S. 100, 102, he stated:

> "The jurisdiction of this Court to review on writ of error, judgments, or decrees of state courts of last resort is defined by § 237(a) of the judicial code as set forth in the amendatory act of February 13, 1925 * * * U.S.C. title 28 § 344 as there defined this jurisdiction applies to two classes of cases—
>
> (1) 'where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity'
>
> (2) 'Where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Plainly the present case is not within the first provision. Is it within the second? This depends on the sense in which the words, 'a statute of any state are used.' If they are used as narrowly comprehending only an enactment of the state legislature, the case is excluded, but if they are used, as broadly comprehending any *legislation* proceeding from the *law* making agencies of the state the case is included.

In usage "statute" is a term which has both a restricted and a broad signification. This is reflected in the following excerpt from Bouviers Law Dictionary, Rawles Revision.

STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the Legislature, solemnly expressed according to the forms necessary to constitute it the law of the state: . . . at page 103. It is further stated:

'This word is used to designate the written law in contradistinction to the unwritten law.

Among the *civilians*, the term "statute" is generally applied to laws and regulations of every sort; every provision of law which permits or prohibits *anything* is designated as a statute, *without* considering from what source it arises' * * *

"It of course rests with each state to determine in what *form* and by what *agencies* its *legislative power* may be *exerted*. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commission."

In commenting on the case of *Williams* v. *Bruffy*, Mr. Justice Van Devanter stated at page 107:

"Williams v. Bruffy, 96 U. S. 176, 24 L. ed 716, is the first case in which, the phrase 'Statute of any State'

in the jurisdictional provision was considered and construed. There a debt arising on contract and owing by a citizen of Virginia to citizens of Pennsylvania, had been sequestered during the Civil War under an enactment of the Confederate States and collected from the debtor by that government. After the war the creditors brought a suit in a state court in Virginia to collect the debt" * * *

The defendants interposed pleas setting up the sequestration and collection under the confederate enactment. Judgment went for the defendant on these pleas over the plaintiff's objection, that the confederate enactment was invalid under the constitution. * * * and at page 108 the court further stated:

"By the only authority which can be recognized as having any legal existence, that is the State of Virginia, this act of the *unauthorized confederation* was *enforced* as a law of the *Commonwealth.* Its validity was drawn in question on the ground that it was repugnant to the constitution, and the decision of the Court below was in *favor* of its *validity.*"

That in the case of *Banque of France* v. *Equitable Trust Co.,* 33 F. 2nd 202. Mr. Justice Goddard stated in his opinion at page 206:

"The decrees and laws of the Confederate States were recognized as *valid* by the Supreme Court unless public policy and justice required otherwise," citing among other cases *Williams* v. *Bruffy, supra.*

That in the case of *Nixon* v. *Condon,* 34 F. 2nd 464, 467, 468, it is stated:

"Plaintiff further alleges that following such decision of the Supreme Court in Nixon v. Herndon, supra, the Legislature of Texas by the act approved June 7, 1927, specially repealed article 3093 (A) and enacted

Article 3107, being Chapter 67 of Laws of Texas of 1927..

"It was contended by the plaintiff that said Act 3107 was unconstitutional in that it is sought and intended thereby to delegate to state executive committees, of Political parties in Texas power to exclude colored persons, from voting at primary elections. * * *.

"The Court held that said Article 3107 provides no action by a state, and directed that no action be taken upon the part of any person or individuals, that is prohibited by either the Fourteenth Amendment or Fifteenth Amendment, under decisions of the Supreme Court of the United States above cited.

"The Court further held that the action could not be maintained unless 'the defendants * * * were acting as officials of the State of Texas, in the name of the state.' In each of the cases Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. ed. 759, citing many other cases, and William v. Bruffy, 96 U. S. 176, 24 L. ed. 716, *and other cases cited,* and relied upon by the plaintiff herein, examination of the facts disclose that the action complained of was based upon *some law* enacted by the *legislative* department of a state, by a municipal corporation, some commission or body corporate, or some person or individual, as an official of the state, acting in his official capacity, each being state officers, holding official position *under the state* as a governmental body, acting as such in the name of the state, and *not* as private individuals.

"On the appeals to this Court (County and Pact) it appears to be clear that, the claim made by both appellants herein that an impairment of the alleged contract herein, was accomplished by Mr. Justice Geiler, Supreme Court, Suffolk County, N. Y., within the provision of Article 1, Section 10 of the United States Constitution is untenable."

That in the case of *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 429, 78 L. Ed. 413, 423, 34 S. Ct.

231. Mr. Justice Hughes, delivered the opinion of the Court in 290 U. S. 423, 429, he stated:

> "The obligation of a contract is the *law* which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat 122, 197, 4 L. ed. 529, at page 431 he further stated:
>
> "The obligations of a contract are impaired by a *law* which renders them invalid, or releases or extinguishes them (Sturges v. Crowninshield, supra, * * * and impairment as above noted has been predicated. of laws which without destroying contracts derogate from substantial rights)."

Pact's interpretation of the law of the case of *Williams* v. *Bruffy, supra,* as claimed in "Pact's" Jurisdictional Statement (p. 8) as applied to the facts in this case on appeal goes far beyond the actual holding in the said case.

It was decided in the *Williams* v. *Bruffy* case, *supra,* that:

> "Any *enactment* from whatever source originating to *which* a *state gives* the force of *law* is a *statute* of the state, within the meaning of the clause cited relating to the jurisdiction of this Court."

The appellants in this case both the "County" and "Pact" are attempting to extend the holding in the *Bruffy* case, *supra,* to include "a judicial decision", upon which the final judgment of the Court of Appeals entered on March 5, 1970 was predicated, and as a result it must now be determined:

> "If the final judgment of the Court of Appeals of the State of New York construing a valid Tax Statute of the State of New York (Suffolk County Tax Act) is within the impairment of the contract clause of the United States Constitution (Art. 1, Sec. 10, par. 1)."

The answer to this question is a definite "No" as determined by Mr. Justice Taft in the case of *Fleming* v. *Fleming* (Iowa), 44 S. Ct. 246, 264 U. S. 29, 68 L. Ed. 547, 549, he stated:

> "In Tidal Oil Co. v. Flanagan, decided January 27, 1924 (263 U. S. 444, Ante. 382, 44 S. Ct. Rep. 197), we had occasion to consider the same issue. After a somewhat full examination we held that by a score of decisions in this Court, a judicial impairment of a contract obligation was not within Sec. 10, Article I of the constitution, since the direction was directed only against *impairment* by *legislation,* and that such judicial action presented no federal question of which this court could take jurisdiction on a writ of error, from a state court * * *
>
> In other words the contention is that the same statute was one *law,* when first *construed* before the making of the contract and has become a new and different act of the legislature by a later decision of this Court. This is *ingenious,* but *unsound.* It is the same *Law.* The effect of the subsequent decisions is not to make a *new* law, but only to *hold* that the law *always meant,* what the court now says it means. The Court has power *to construe* a legislative act, but it has *no* power, by a change in construction, *to date* its passage, as a *law* from the time of the later decision. A statute in force at the time a contract was made, cannot be made a subsequent statute through new interpretation by the Courts." (Emphasis supplied)

In the *Flanagan* case, *supra,* Mr. Justice Taft, also delivered the opinion of the Court in 68 L. Ed. 385, 386, he

stated:

> "It has been settled by a long line of decisions[1] that the provision of Sec. 10, Article I of the Federal Constitution protecting the obligation of contracts against *state action* is directed only against *impairment* by *legislation,* and not by judgments of the Courts. The language 'No state shall . . . pass any law impairing the obligation of a contract—plainly requires such a conclusion.' However the fact, that it has been necessary for this court to decide the question so many times is evidence of the persistent error in regard to it. Among the cases relied upon to sustain the error are Gelpcke v. Dubuque, 1 Wall 175, 17 L. Ed. 520 citing many cases—Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. 736. These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to the Federal Courts where recovery was sought upon municipal bonds or other forms of contract * * *. In such cases the Federal Courts exercising Jurisdiction between citizens of different states, held themselves to decide what the state law was and to enforce it as laid down by the state supreme court, before the contracts were made, rather than in later decisions. They did not base this conclusion on Article I, Sec. 10 of the Federal Constitution, but on the state law as they determined it."

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[1] *Knox* v. *Exchange Bank W. Va., 1895,* 16 S. Ct. 80, 159 U. S. 103 40 L. Ed. 91; *Commercial National Bank* v. *Buckingham,* Ohio 1847, 46 U. S. 317 57 How. 317, 12 L. Ed. 169; *Commercial Bank* v. *Buckingham,* 5 How. 317, 343, 12 L. ed. 169, 181; *Mississippi & M. R Co.* v. *Rock,* 4 Wall. 177, 181, 18 L. ed. 381, 382; *Mississippi & M. R. Co.* v. *McClure,* 10 Wall. 511, 19 L. ed. 997; *Knox* v. *Exchange Bank,* 12 Wall. 379 383, 20 L. ed. 414, 415; *Lehigh Water Co.* v. *Easton* 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.,* 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741.

and at page 387, the court further stated:

> "This Court has always held it is a prerequisite to the consideration of the federal question in a case coming from a state court that the question should have been *raised* in that court *before decision* or that it should have been actually entertained upon petition to rehear."

In the cases on appeal herein, there was no motion made for reargument, nor was any writ of certiorari applied for, instead allegedly pursuant to 28 U.S.C.A. 1257(2) a direct appeal has been taken in this court.

The Appellate Jurisdiction of this court upon writ of error to a state court on the grounds that the obligations of a contract has been impaired can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the State Court to be valid and not when an act admitted to be valid, has been misconstrued by the court, *Central Land Co.* v. *Laidley W. VA., 1895,* 16 S. Ct. 80, 159 U. S. 103, 40 L. ed. 91.

That from the foregoing it seems to appear it has no jurisdiction to review the aforesaid judgment of the Court of Appeals of the State of New York entered on March 5th, 1970.

1. That section 71 of the Suffolk County Tax Act is admitted to be valid by the appellants in both the "County and Pact Appeals".

2. That it is also admitted that the alleged contract herein was not impaired by any subsequent legislative act or any other act which the state of New York has given the "force of law".

3. The construction of Sec. 71 S.C.T.A. by Mr. Justice Geiler of the Supreme Court, Suffolk County, New York did not impair the obligation of the alleged contract herein,

as said impairment is defined under Article 1, section 10 of the United States Constitution.*

POINT II

No valid contract for the tax sale of the "Premises" herein, was entered into by Chester F. Jacobs as County Treasurer of the County of Suffolk (appellants) in the County Appeal and "Pact Realty Corp." the appellant in the Pact Appeal on November 16, 1964.

> "The appellants in both the 'County Appeal' and the 'Pact Appeal claim that' a valid contract for the sale of the premises at a tax sale for the 1963/1964, taxes, was entered into by the 'appellants' in the County Appeal as vendor and the 'Pact Realty Corp.', as vendee on November 16th, 1964 the date of the tax sale for 1963/1964 taxes allegedly due thereon."

"The appellant in the Pact" appeal stated on Page 12 par. 3 in its Jurisdictional Statement "One must look to SCTA for legislative intent, as to what kind of notice they were entitled to *after the* tax sale, in order, that they would receive due process.

The validity of a tax title depends on strict compliance by the taxing authorities with every mandatory statute in the chain of title.

Among those statutes which must be strictly complied with after the date of the sale are Sections 70, 71, 75 and 52

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* *Knox* v. *Exchange Bank W. Va.*, 1895 16 S. Ct. 80, 159 U. S. 103, 40 L. Ed. 91; *Commercial National Bank* v. *Buckingham, Ohio*, 1847, 46 U. S. 317, 57 How. 317, 12 L. Ed. 169; *Commercial Bank* v. *Buckingham*, 5 How. 317, 343, 12 L. Ed. 169, 181; *Mississippi & M. R. Co.* v. *Rock*, 4 Wall. 177, 181, 18 L. Ed. 381, 382; *Mississippi & M. R. Co.* v. *McClure*, 10 Wall. 511, 19 L. Ed. 997; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383, 20 L. Ed. 414, 415; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 30 L. Ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18, 30, 31 L. Ed. 607, 612, 8 Sup. Ct. Rep. 741.

of the Suffolk Tax Act, and certain sections of the Real Property Tax Law of the State of New York which are incorporated in Section 52 entitled "Notice of Unredeemed Real Estate, Notice to Redeem", which said mandatory statutes by their terms could only be complied with by the taxing authorities subsequent to the date of the tax sale.

The sections of the real property Tax Law incorporated into Section 52 of the Suffolk County Tax Act are Sections 1014(1) and Section 1010(1)(a) Real Property Tax Law (N. Y.) (Appendix A).

The appellants in both appeals from the final judgment of the New York Court of Appeals, rely upon the case of *Wood* v. *Lovett*, 313 U. S. 362, 369, as authority for their contention in this case as stated in Pacts' jurisdiction statement "that a contract resulted at the 11/16/64 tax sale between the Suffolk County Treasurer who sold the subject property to appellant" (p. 8, Par. 1).

In that case the State had already acquired title in 1933. The land was not redeemed and was certified to the State as owner. In 1936, the Commissioner of State Lands, on behalf of the State, by *deeds* reciting his *statutory* authority to do so, conveyed to the appellants all the right, title and interest of the State in two parcels of land (313 U. S. 362, 365).

The power and authority of the Commissioner of Lands to convey was not questioned by this Court, for the reason that the record shows such authority to sell existed (pp. 366, 367), and at page 370 the Court further stated:

> "the laws which subsist at the time of the making of a contract, and where it is to be performed, enter into and become a part of it, as if they were expressly referred to or *incorporated* in its terms,"

and in the case of *Home Building & Loan Assoc.* v. *Blaisdell*, 290 U. S. 398, 430, in addition to the above this court stated:

"This principle embraces alike, those which affect its validity, *construction,* discharge and enforcement."

There is no question of the fact that Section 71 SCTA is one of the statutes (laws) which form a part of the contract herein for the reason that it became a part of the Suffolk County Tax Act by Chapter 152 of the Laws of 1929, and has not been amended to date (RA137).

There is a vast difference in the statutory procedure or authority that must be complied with by a taxing official (such as the County Treasurer, in this case) to enter into a contract to sell property already acquired at a tax sale by a quit claim deed to a purchaser, as in *Lovett* case, *supra,* page 370 and the statutory authority, if any, which would permit, as in this case a County Official, of the County of Suffolk, County Treasurer, to enter into a binding contract on behalf of the County of Suffolk of the State of New York, with a purchaser for the tax sale of real property sold, at a tax sale, the *fee title* to which was still vested in the *fee owner.*

In the first instance, it must be assumed that the tax title acquired by the state, was immune from attack in fact, this Court stated in the *Lovett* case *supra* at page 368:

> "That Act of 1935 must be viewed in the setting of the *statutory* scheme of taxation, sale of forfeited lands to the State, and sale in turn by the State. Its purpose was to assure one willing to purchase from the State a title immune from attack on grounds theretofore available."

The appellants in the "County Appeal" and the "Pact Appeal," herein, from the Judgment of the New York Court of Appeals, herein, have the burden to show affirmatively that this Court has jurisdiction to review the aforesaid judgment. *Gorman* v. *Washington University,* Mo. 1942, 62 S. Ct. 962, 316 U. S. 98, 86 L. ed. 1300.

In the cases on appeal herein, the record is *barren* of any facts or proofs whatsoever, which would show to this

Court that the appellant, the County Treasurer of the County of Suffolk, *had* any *power* or *authority* whatsoever to *enter* into any *contract* for the sale of any tax sale property, the title to which had *not* been previously acquired by the County.

The only power and authority the County Treasurer has under the provisions of the Suffolk County Tax Act is that pursuant to part of Section 53 after all the tax sales proceedings have been completed, is to execute "a conveyance of the real estate so sold, which conveyance shall vest in the grantees and absolute conveyance of real estate, in fee * * *. Every such conveyance shall be attested by the County Treasurer * * * and when so executed shall be *presumptive evidence* that the sale was regular and also *presumptive evidence* that all proceedings prior to the sale, including the assessment of the lands sold, and all *notices* required by *law* to be given previous to the expiration of the time allowed by law for the *redemption* thereof were regular, and according to law."

A reading of the foregoing provisions of Section 53 SCTA appears to be conclusive proof that the County Treasurer of Suffolk County had no authority to enter into a contract on 11/16/1964 the date of the tax sale herein.

In addition there is further proof of the lack of power and authority in the "County Treasurer's Deed" (RA63-69) accepted by the tax sale purchaser herein to enter into said tax sale contract on 11/16/1964, as set forth (RA67) as follows:

> "to have and to hold the same to the party of the second part, its, his or her distributees, successors and assigns forever, subject however, to the rights, claims, encumbrances, or liens, if any; of others remaining or existing under notwithstanding, or by virtue of the *statutes* applicable to such *taxes, tax sales,* and *issuances* of this conveyance."

That it is respectfully submitted to this Court that regardless of the fact, that there *may* have been a contract

entered into on 11/16/1964, the terms and obligations of said contract were merged in the foregoing tax deed, and by the terms of said tax deed which was *accepted* by the *tax sale purchaser,* the subject property at that time was still subject to the mandatory provisions of the Suffolk County Tax Act affecting tax sales, *post.*

As a result of the failure of the taxing authorities to comply with the strict provisions of Section 71 of the SCTA, the Statute in this case, and Section 52 SCTA which will be set forth in the following point it affirmatively appears that at least two of the links in the tax chain of title have been broken, and as a result, the tax sale purchaser obtained no tax title to the subject property.

That in addition, the fact, that the tax chain of title was broken, as heretofore set forth no valid contract ever came into existence, and as a result there was no obligation which could be impaired, within the clause of impairment of a contract as defined by Article 1, Section 10, Par. 1 of the United States Constitution.

That in the case of *John S. Knox* v. *The Exchange Bank of Virginia,* 79 U. S. 379, 12 Wall 379, 20 Led. 414, Mr. Justice Miller delivered the opinion of the Court and in 20 Led. 414, 415, stated:

> "But we are not authorized by the Judiciary Act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. *If we did,* every case decided in a state court, *would be brought here,* when the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held, as this court said in Railroad Co. v. Rock, 4 Wall 181, 182 Led. 382, it must be the Constitution, or statute, which impairs a contract, or the case does not come within our jurisdiction. See also Railroad Co. v. McClure, 10 Wall. 511; 19 L. ed. 997."*

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* See *Tidal Oil* v. *Flanagan, supra; Commercial Bank* v. *Buckingham,* 5 How. 317, 343, 12 L. 169, 181.

The principal arguments of the appellant, Pact Realty Corp., appellant in the "Pact" Appeal are: (1) That "Pact" was vested with property rights at the tax sale, and (2) Special Term divested "Pact" of its property rights in violation of its constitutional rights.

The foregoing arguments are untenable and are based on the false premise that the Buyer at the time of the tax sale, acquires title to the real property covered by said tax sale, subject only to being divested by the redemption of said tax sale by the fee owner. This is not true. The sale itself is in no sense a conveyance of real property. Nothing is more demonstrative of the proposition, that it is not a conveyance of real estate tax sale property, than the tax statute itself which provides that the buyer at the tax sale will not receive a deed until thirty-six months *after* the date of the sale.

POINT III

The failure of the appellant "Chester F. Jacobs, as County Treasurer of the County of Suffolk" and the appellant "The County of Suffolk of the State of New York" and defendants in the State Courts N. Y. to plead any "Federal" or "Constitutional Question" in their joint "Answer" to the Amended Complaint as an "Affirmative Defense" in the Courts of the State of New York precludes the raising of said Questions "for the first time on this appeal" (County Appeal Case No. 220) (October Term, 1970).

The appellants on this Appeal (County appeal No. 220) admit in their Jurisdictional Statement (p. 4) (hereinafter referred to as (County J. S. 3) that the "Federal Question" sought to be reviewed was raised in the Court of first instance by an "Affirmative Defense" in pleading (Record) appellants Joint Appendix by stipulation A147 in the answer of Pact (R, pp. A59-A60) and that it is their claim that the Supreme Court of the State of New York passed upon the Federal Question "by striking the answers of

all the defendants" and granting the relief demanded in the amended complaint (RA15, A44-45) by voiding the tax sale as well as the tax deed.

The question whether a federal question was pased upon or not will be left for future consideration.

The only question to be considered under this point is:

Do the appellants on this Appeal (Case #220) have the right to raise a "Federal Question" on this appeal, for the first time, which they failed to plead as an "Affirmative Defense" in their answer (RA71, A72) to the amended Complaint in this action?

The anwser to the above question is "No" for the following reasons:

The "Federal Question" claimed to have been raised by the "appellants" in the "County Appeal" was admittedly not raised in their pleadings in the State Courts, except that, it is now claimed by said "appellants" that it "can now adopt" the "alleged" "Federal Question" raised by Pact in the State Court (RA59, A60).

Under the Law of the State of New York, what matters must be pleaded as an "Affirmative Defense" in an answer to a complaint is mandated by Section 3018 (B) of the Civil Practice Law and Rules of the State of New York (Appendix A).

It is to be "noted" that nowhere in the "County J. S." is it claimed that any affirmative Defense was pleaded or raised by the appellants on this appeal other than as above stated (Pacts Answer, RA59-A60).

Section 3018 (B) provides in substance that "any matter" which would take the adverse party by surprise, if not pleaded, or which would raise issues of fact not appearing on the face of a prior pleading *must* be raised as an "Affirmative Defense."

Spatz Furniture v. *Lee Letter Service*, 52 Misc. 2nd 291, 294 (N. Y.); *Gunther* v. *Village of Larchmont*, 30 A. D. 2nd 303, 305 (N. Y.); *Parmellie* v. *Lawrence*, 78 U. S. 11 Wall. 38, 20, 49; *Shelley* v. *Kraemer Mich. & Mo.*, 1948, 68 S. Ct. 836, 334 U. S. 31, 92 L. Ed. 1161, 3 ALR 441.

That in the case of *Puget Sound Power, etc.* v. *King County* (Wash. 1924, 445 Ct. 261, 264 U. S. 22, 68 L. Ed. 541, this Court held in 68 L. Ed. 545, that

> "Whatever the effect of the distinction in the procedure of the State, which counsel seek to make, we are in no doubt that that which the Washington Statute calls the judgment is the Judgment referred to in the Act of Congress of September 6, 1916, supra, fixing the time in which writs of error must be applied for and allowed. The motion to dismiss the writ granted the Power Company must be denied.
>
> A separate motion to dismiss is directed against the City of Seattle which appears as plaintiff in error with the street railway company. It was made a defendant in the Superior Court by the company. It filed an answer supporting the averments of the Complaint and a cross complaint against its co-defendants, asking the same relief as that asked in the complaints. It took a separate appeal to the Supreme Court of the state. *No evidence appears in the record that it raised an objection based on the 14th Amendment to the Federal Constitution or any other Federal question* in the *Superior* Court or the *Supreme* Court.
>
> It is too late for the city to raise it in the assignments of errors, *with* the street railway company, which did raise the question in all the Courts. Sully v. American National Bank, 178 U. S. 289, 297, 44 L. Ed. 1072, 1075; 20 Sup. Ct. Rep. 935. It is difficult to see how, under Trenton v. New Jersey, 262, U. S. 182, 67 L. Ed. 937, 29 ALR 1471, 43 Sup. Ct. Rep. 534 and like cases, the city could have been heard, as against the state to complain

of state taxes on the ground that they violated the 14th Amendment, but it is not necessary to decide this. The motion to dismiss the writ of the City *must* be *granted* for the reason first stated."

In the case of *Edelman* v. *State of California, supra, Edelman* v. *State of Cal. Col.* 1953, 73 S. Ct. 293, 344 U. S. 357, 97 L. Ed. 387, in 97 L. Ed. 387 on page 391, the Court stated:

> "It is clear that this Court is without power to decide whether Constitutional rights have been violated when the Federal Questions are not seasonably raised in accordance with requirements of State Law."

Hulbert v. *Chicago,* 202 U. S. 275: 50 L. Ed. 1026, 265 ct. 617 (1906); *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308, 47 L. Ed., 480, 484, 233 ct. 375, 63 LRA (1903). Non compliance with such local law can thus be an adequate state ground for a decision below.

It follows that the question whether the vagrancy statute is invalid under the 14th Amendment is not properly before us.

That from the foregoing it appears that the appellants in the "County Appeal" No. 220 not having raised any "Federal Questions" in their pleadings in the State Courts, they cannot now be permitted to raise any "Federal Questions" for the first time on their appeal to this Court (Case #220) from the aforesaid judgment of the Court of Appeals of the State of New York.

POINT IV

The failure of the appellant (Pact Realty Corp.) in the (Pact Appeal No. 221) to properly plead as an "Affirmative Defense" in its answer to the amended complaint of the plaintiffs in the State Court of the State of New York, sufficient ultimate facts to show the actual "Federal or Constitutional" questions, sought to be reviewed by this Court, said "Affirmative defense as pleaded is insufficient as a Matter of Law".

This action as previously stated is based upon the fact that the Courts of the State of New York including the Court of Appeals have determined as a Matter of Law that section 71 of the Suffolk County Tax Act, a part of Chapter 152 of the Laws of the State of New York (1929), is a valid tax statute of said state.

The courts of said state including the Court of Appeals have also decided as a Matter of Law, that the Taxing Authorities of the County of Suffolk of said State and also in this case, "Of the Town of Babylon of the State of New York" have failed to strictly comply with the mandatory and jurisdictional requirements of Section 74 S.C.T.A., which resulted in the cancellation of the tax sale and tax deed of the tax sale purchaser.

That the appellant Pact in its answer (RA59-A60) merely alleges "1. Any nullification of the deed of the defendant Pact Realty Corp., upon the grounds alleged in the complaint would deprive the defendant Pact Realty Corp. of its constitutional rights under

(a) Article I, Section 10 of the United States Constitution;

(b) Amendment V of the United States Constitution;

(c) Article I, Section 6 of the New York State Constitution;

(d) Article III, Section 1 of the New York State Constitution.

A reading of the above 'Affirmative Defense', as pleaded clearly shows that said 'Affirmative Defense' as pleaded are mere Conclusions of Law."

Article I, Section 10 of the United States Constituttion contains (3) paragraphs containing many constitutional rights and said defense as pleaded does not show which of the many Federal constitutional rights therein may have been violated, and in addition no ultimate facts are set forth or pleaded in said answer to show how and in what manner, the Judgment of the Court of Appeals of the State of New York entered on March 5th, 1970 has deprived it of its constitutional rights.

The Fifth Amendment of the Constitution of the United States also contains many constitutional rights, and as heretofore set with, said part of said affirmative defense as pleaded for the same reason is also insufficient as a "Matter of Law".

The appellant Pact in its Jurisdictional statement herein page 8 (hereafter referred to as Pact J. S.) relies heavily upon (3) cases *Wood* v. *Lovett,* 313 U. S. 362, 369, *supra, Clarke v. Mayor of New York City,* III N. Y. 621, 623-624 and *Post* v. *Cowan,* 236 A. D. (N. Y.) 26, set forth in the main brief submitted in the Court of Appeals as authority for its claim that its constitutional rights have been violated but the appellant Pact has neither in any of its pleadings in the Courts of the State of New York, nor in the affirmation of Moses Krivis in support of its motion for summary judgment (RA24) set forth or pleaded any ultimate facts which would conclusively show how and in what manner the affirmative defense as pleaded in its answer (RA59-60) to the amended complaint is sufficient as a "Matter of Law" to properly raise in the State Courts

"Federal Questions", which question could or should have been passed upon by the Court of Appeals of the State of New York.

That the appellant Pact Realty Corp. in the "Pact Appeal" has also set forth as above noted that any nullification of the deed, etc., would deprive it of its constitutional rights under Article I, Section 6 and Article III, Section 1, of the New York State Constitution.

This Court "is without authority to review and revise the construction affixed to a state statute as to a state matter as construed by the Court of Last Resort of the State". *Quong Hom Wah Co.* v. *Industrial Commission*, Cal., 1921 41 S. Ct. 373; 255 U. S. 445, 448, 65 L. Ed. 723 and cases cited. *Terrace* v. *Thompson*, Wash. 1923, 44 S. Ct. 15, 263 U. S. 197, 68 L. Ed. 255.

The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court. *Carstairs* v. *Cochran*, MD 1904, 24 S. Ct. 318, 193 U. S. 10, 48 L. Ed.

That from the foregoing it appears that the "Affirmative Defense" as pleaded in the "Fourth Affirmative Defense", in "Pact's" answer to the amended complaint contains only "Conclusions of Law" as to "Federal Questions" and as a result of said "Affirmative Defense" is insufficient as a "Matter of Law" to raise any "Federal Questions". See cases under Point III.*

POINT V

The doctrine of "Wood v. Lovett," *supra*, does not apply to the facts in the cases on appeal to this Court.

The Appellees "Rogers" have no quarrel with the holding in the case of *Wood* v. *Lovett, supra*, which holds that

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* *MacIveré* v. *George Brazzilleo, Inc.* (N. Y.) 32 Misc. 2nd Series 477, 478;
Guffo v. *Taurielli* (N. Y.) 23 Misc. 2nd, 430, 433;
Morganstern v. *Cohon*, 2 N. Y. 2nd, 302, 307;
McGowan v. *McGowan* (N. Y.), 4 Misc. 2nd, 165;
Schiff v. *Schiff*, N. Y. 270 A. D. 845, 846.

a taxing authority can enter into a valid contract to sell real property previously acquired by the State at a tax sale to a purchaser, and that said contract could be impaired by a subsequent legislative enactment of a statute, which repeals the Statute under which the contract was made, but the facts of that case are entirely different from the cases on appeal to this Court.

In the *Lovett* case, *supra*, the State of Arkansas at the time that it contracted to sell the property at tax sale had already acquired the tax title to the real property in question.

In the cases on Appeal to this Court, at the time that the alleged Contract was made on November 16, 1964, the property was first sold at a tax sale on that day and subsequently a Certificate of Sale (not a deed) was executed and delivered by the County Treasurer to Pact Realty, the Tax Sale purchaser, both appellants herein.

In the *Lovett* case, *supra*, the contract was consummated by the execution and delivery, by a quit claim deed to the purchase pursuant to a 1935 Act of the Arkansas Legislature, which said Legislative Act was totally repealed by a 1937 Act of the said Arkansas Legislature and as a result the contracts therein was impaired within the meaning of the Constitution by a subsequent Legislative Act.

In the case before this Court it is *admitted* by the appellants in the "County Appeal" (County J. S. Par. 1 Page 8) that no Legislative Act, impaired the obligation of the alleged contract herein, but that "The Court of Appeals decisions, had made mandatory, that which the Legislature said was directory and by so doing has made Secs. 70 and 71 of the Suffolk County Tax Act repugnant to the United States Constitution Art I, Sec. 10 and Amendment V".

The fact however in the case before this Court on November 16th, 1964 an alleged contract was entered into, however by its terms, in order to complete the contract so that a valid tax deed could be executed and delivered by the taxing authorities (pursuant to the Statutes then in force, includ-

ing Sec. 71 of SCTA) it became necessary for said taxing authorities to strictly comply with the mandatory provisions of Sections 71, 52, 70 and 75 of the Suffolk County tax Act and any failure of said taxing authorities to perform the duties imposed on the taxing authorities by the mandatory and jurisdictional requirements of any of said "Statutes" resulted in a nullification of the terms of said entire contract, and any alleged tax deed given to a tax sale purchaser by the County Treasurer of the County of Suffolk.

Since the obligation which the Constitution of the United States protects from impairment are such as exist, by reason of the contract, it follows that as a basis for invoking the rule, *there must be a valid contract*, possessing the essential element of consent. Furthermore the impairment of a contract cannot exist, where the alleged contract is based upon a proviso contained in a void statute.

It is for the reason set forth above that the appellants in both of the appeals herein take the *unique* position that although Sections 70 and 71 of the Suffolk Tax Act are not *void*, nevertheless, "the decision of the New York Court of Appeals erroneously applies law to a statute so that it results in the *unconstitutional impairment of a contract*, and, by cancelling a recorded deed, deprives a party of property without due process of law under the federal constitution" (County J. S. pp. 9 and 10).

The appellant "Pact" in other words takes the same position in (Pact J. S. p. 8).

That at this point, the facts in the appeals before this court, make it necessary to determine:

> "If a Judicial Decision of the highest Court of the State of New York construing a valid 'Statute of the State' invalidates the obligation of a contract made pursuant to said valid statute as said impairment of the obligation is defined in Article I Section 10 of the Constitution."

The answer to this question is to be found in the cases of *Fleming* v. *Fleming,* decided February 8th, 1924, Iowa, 44 S. Ct. 246, 264 U. S. 29, 68 L. Ed. 547, decided February 8, 1924.

Mr. Justice Taft delivered the opinion of the Court, and in 68 L. Ed. 547, at page 549, he stated:

> "In Tidal Oil Co. v. Flanagan decided January 7, 1924 (263 U. S. 444, anti 382 44 S. Ct. Rep. 197) we had occasion to consider the same issue. After a somewhat full examination we held that, by a score of decisions of the court, a *judicial* impairment of a contract obligation *was not within* § 10 Article 1, of the Constiution, since the inhibition was directed *only against impairment* by legislation, and that such judicial action presented no Federal question of which this court could take jurisdiction on a writ of error from a State Court." (Emphasis supplied.)

In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has become a new and different act of the legislature by the later decision of the Court. *This is ingeneous* but unsound. It is the same law. The effect of the subsequent decisions is not to make a *new law*, but only to hold that the law *always meant* what the Court now says it means. The Court has power to construe a legislative act, but *it has no power,* by a change in construction, *to date* its passage, as a law from the time of the later decision. A *statute* in force at the time a contract was made *cannot* be *made* a subsequent statute through *new interpretation by the Courts.* (Emphasis supplied.)

In the *Flanagan* case, *supra,* Mr. Chief Justice Taft also delivered the opinion and in 68 L. Ed. 385 and 386, he stated "It has been settled by a long line of decisions, that the provision of § 10 Article I of the Federal Constitution

protecting the obligation of contracts against state action is directed only against impairment by legislation and not by judgment of the Courts. The language No state shall . . . pass any law impairing the obligation of contracts—plainly requires such a conclusion." However the fact that it has been necessary for this court to decide the question so many times is evidence of the persistent error in regard to it.*

POINT VI

No Federal Question was passed upon in this case by the Court of Appeals of the State of New York, for the reason that the Judgment herein rests on an adequate non-federal basis.

The record in this case (appellants' Joint Appendix), stipulated as the whole record to be considered by the Court of Appeals (A147) and the Order for Judgment on the Remittitur and the Judgment on Remittitur filed in the Office of the Clerk of the County of Suffolk on April 15, 1970 and filed in this Court on June 3, 1970, shows that this is an action to determine claims to the real property which is the subject of this action, located in the County of Suffolk and the State of New York.

The record further shows this action was brought by the plaintiff William Rogers, and Rose Rogers, his wife, appellees on this appeal, against the appellants herein and The Town of Babylon, of the State of New York, which has not participated on this appeal.

The law involved in said action is Chapter 152 of the Laws of 1929 (New York) also known as The Suffolk County Tax Act.

The section of said Tax Act directly involved and the Statute on which said action is based is Section 71 of the Suffolk County Tax Act.

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* *Lathrop* v. *Donohue*, 367 U. S. 820, 6 L. Ed. 2 1191, 1195, 81 S. Ct. 1826.

That the record also shows that the Decision of Mr. Justice Geiler of the Supreme Court of Suffolk Co. (RA 131-A145). The corrected decision (A146), the Judgment entered thereon and filed in the Office of the Clerk of the County of Suffolk (RA A 11-A17) on the Decision of the Appellate Division of the Supreme Court (RA 154), officially reported in 32 A. D. 2d 929, the Order entered thereon (RA 152-A153) and the Decision of the Court of Appeals (26 N. Y. 2d 872), and the judgment entered thereon clearly shows that none of the Courts of the State of New York, in this case either passed upon or considered any "Federal Questions Raised" for the reason that said Orders and Judgments rested solely on adequate non-federal grounds.

That in the case of *Black* v. *Cutler Laboratories,* Cal. 1956, 76 S. Ct. 824, 351 U. S. 292, 100 L. Ed. 1188, rehearing denied 77 S. Ct. 352 U. S. 859, 1 L. Ed. 2d 69, Mr. Justice Clark delivered the opinion of the Court in 100 L. Ed. 1188, 1197, the court stated:

> "We believe the Supreme Court of California construed the term 'just cause' to embrace membership in the Communist Party, and refused to apply the doctrine of waiver. As such the decision involves only California Construction of a *local contract under local law* and no substantial federal question is presented. Moreover, even if the State Court's opinion is to be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question. See Stembridge v. Georgia, 343 U. S. 541, 547, 96 L. Ed. 1130, 1133, 72 S. Ct. 834, Point I, supra, and cases cited, Cf. United States v. Rumely, 345 U. S. 41, 97 L. Ed. 770, 73 S. Ct. 543. It follows that the writ must be dismissed."

POINT VII

Special Term's construction of Sec. 71 SCTA does not create an additional notice to redeem or create an additional notice of the tax sale, nor does said construction create legislation by judicial decree, forbidden under Article III, Sec. 1 of the New York State Constitution.

Appellant, Pact Realty Corp. contends that special term's construction of Sec. 71 SCTA would create an additional notice to redeem from the tax sale or as an additional notice of the tax sale is legislation created by judicial decree, forbidden under Article III, Sec. 1 of the N. Y. State Constitution. This contention is not based on the facts in this case. The 1963/1964 tax bill and the 1964/1965 tax bill admittedly do not conform to the exact provisions of Sec. 71 of the SCTA. Is the failure to follow Sec. 71 SCTA fatal to the tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila* v. *Mitrany*, N.Y.L.J., December 24, 1965, p. 10, col. 5, affirmed by the Court of Appeals, 21 N. Y. 2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However, sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note 'arrears' on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court is guided by decisional law contained in the

case of Ierna v. Maranzano, 211 N.Y.S. 2d 616; Erlwein v. Patchogue Homes Corp., 43 Misc. 2d 707, 252 N.Y.S. 2d 220 and Proschieck v. Erlwein, N.Y.L.J., 7/31/64, p. 8, col. 5, Aff'd 22 A. D. 2d 1018, leave to appeal denied, 15 N. Y. 2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission of the word 'Arrears' on a subsequent tax bill, held that the provisions of Sections 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance.''

Unless Sec. 71 of SCTA is complied with in all its provisions and requirements any tax sale pursuant thereto would be invalid and void, even though acts were to be performed after the tax sale.

Special term in holding that the *1963/64* tax bill was void (RA 137) for two reasons dealing with the format of the Bill: (1) In that it failed to provide therein ''A ruled column for Arrears'' as required by 71 SCTA and (2) It had printed on the bottom of the reverse side of the tax bill, the legend called ''County Treasurer's Notice'', instead of having it printed on the bottom of the front (RA 137) of said tax bill, was completely within its authority to construe and interpret. Sec. 71 SCTA must be construed in its strictest terms in favor of the taxpayer and nothing in Sec. 71 SCTA can be construed as superfluous, and possible harm did result to the plaintiffs-respondents, by reason of the omission of ruled column, as required by the terms of Sec. 71 SCTA, otherwise this procedure would not be before this Court.

POINT VIII

The case of *I. Jack London* v. *Richard Hammel*, New York Court of Appeals 6/15/1970.

Subsequent to the decision and judgment of the Court of Appeals of the State of New York, appealed from by both the appellants in the "County Appeal" and the "Pact Appeal" entered March 5, 1970, herein and also subsequent to the filing of these appeals in this court (June 3, 1970) the said Court of Appeals of the State of New York rendered a decision on June 15th, 1970 in the Case of *I. Jack London* v. *Richard Hammel.*

In said case, the published notice to redeem from the tax sale given by the County Treasurer of Suffolk County one of the appellants herein pursuant to Sec. 52 SCTA did not state "the amount necessary to redeem the same computed to the last day in which such redemption can be made".

The appellants in the appeals in this case "County" and "Pact" both take this position that the tax sale of 11/16/1964 was subject only to the right of redemption by the fee owner, and by their failure to redeem after having been served with "Notice to Redeem" in the form of a redemption notice as specifically prescribed by Sec. 52 SCTA, that the right to redeem ceased and that as a result the alleged contracts, heretofore referred to, entered into on 11/16/64 became a valid and binding contract.

The Memorandum decision of the Court of Appeals in the *London* case, *supra,* has not up to this time been officially reported. A certified copy of the official decision has been ordered from the Court of Appeals, but has not been received. The unofficial decision (Memorandum) follows:

"MEMORANDUM:

The order of the Appellate Division should be reversed and the case remitted to Supreme Court, Suffolk County, for the entry of judgment in favor of plaintiff-appellant London on his first cause of action.

Section 52(1) of the Suffolk County Tax Act (added by L. 1929, ch. 152, and L. 1958, ch. 960 § 29) requires, before expiration of the period for redemption of land sold at tax sales, publication of a notice of unredeemed real estate, containing, as provided in section 1014(1) of the Real Property Tax Law, 'the amount necessary to redeem the same computed to the last day in which such redemption can be made'. Section 75 of the S.C.T.A., authorizing a tax sale purchaser to pay taxes on the property not paid by the owner of record, requires that these taxes, plus interest and penalties, be paid by the owner of record at the time of redemption (see, also, Real Property Tax Law, § 1010[1][a]). The failure of the County Treasurer to include this additional sum in the published notice, when the payment of taxes by the purchaser was already known to him at the time of publication, is a substantial deviation from the mandate of the statute. The statutory provision, for the benefit of the owner, should be strictly construed in his favor, even if he may have eventually received notice of the correct amount by methods other than required by the statute. The tax deed is therefore void, and the owner should be permitted to redeem the property. (Cf. *Rogers* v. *Pact Realty Corp.*, 26 N. Y. 2d 872; *Stebila* v. *Mitrany*, 21 N. Y. 2d 930; *Clason* v. *Baldwin*, 152 N. Y. 204, 209-211.)

* * * * *

Order reversed, without costs, and the case remitted to Supreme Court, Suffolk County, for further proceedings in accordance with the memorandum herein. All concur."

That upon receipt of the certified copy of the foregoing decision from the Court of Appeals the original will be

filed with this court and copies furnished to the appellants. That Pact in its jurisdictional statement Page 13 Par. 1 states:

> "A valid tax sale cannot be wiped out, except by *proper* redemption."

At page 12 (pp. 3 and 4) Pact states:

> "to anticipate appellees presentation of their argument that they were deprived of their property without due process when their property was sold for non-payment of the 1963/1964 taxes * * *.
>
> The answer is contained in Sec. 52 SCTA which spells out, how, when, and who is to serve appellees with a notice to redeem from the tax sale-who-the 'County Treasurer' when—'at least three months before the thirty-six months allowed for the redemption of the real estate sold, how—under the terms *prescribed by the real property tax law,* which is by newspaper publication of a fixed frequency'."

That pursuant to the provisions of Section 75 SCTA the tax sale purchaser "Pact" herein paid to the County Treasurer of the County of Suffolk taxes due on the subject property herein for 1965/1966, 1966/1967 and redeemed tax sale Cert. #154 of Joseph Harris (RA 25) prior to the time it received the tax deed herein.

That it has often been said that where an invalid or improper notice has been served or given, allegedly pursuant to a statute, said notice is no more effective "to extinguish vested rights" than if not notice of any kind were given.

This is especially true, if the notice required to be given, as in this case, is both mandatory and jurisdictional. A proper *redemption* must be *based* upon a *valid notice to redeem,* and by reason of the failure of the "County Treasurer of Suffolk County" one of the *appellants* in this

case is to give a "proper and valid notice to redeem" pursuant to Section 52 of Suffolk County Tax Act, the tax sale and tax deed are void for the reason that section 52 SCTA was not complied with, by the "appellant", the County Treasurer of Suffolk County in that he did not cause to be published a valid and proper notice to redeem in the form as mandated by the provisions of Section 52, SCTA.

POINT IX

Any disasterous results of Special Term's decision is not the fault of the plaintiffs-respondents, but is the fault of the taxing authorities of the Town of Babylon and the County of Suffolk.

The legislature has the authority to pass our laws and when it enacted Section 71 SCTA it was fully mindful of the fact that on *all* tax bills of any real property in said County there *must appear* on the *front* or face of said bills all of the mandatory provisions of said Section 71 SCTA from which the owner or owners could determine *at a glance* at said tax bill if there were *any tax arrears,* on said real property or if the same had been *sold* for *unpaid* taxes and were *still redeemable* and the *title of the county official* from whom the property owner could obtain such vital information.

That as a result in *order to protect* and give to the fee owner of all property in the County of Suffolk actual notice of the taxable status of said real property, the Legislature *mandated* when it enacted Section 71 of SCTA the actual "*Format*" of every tax bill of the respective Towns of the County of Suffolk as to *arrears* or *tax sales* so that the fee owners would be protected against an illegal tax sale of their real property.

That as a result said Section 71 mandates

(1) There must be a ruled column for arrears on every tax bill.

(2) That said column for arrears *must* be opposite the description of the parcel assessed.

(3) That if there are any arrears that may be due, or tax sales that are still redeemable there shall be written in said column the word "*Arrears.*"

That in addition the Legislature was also fully mindful of the fact that the only tax official of the County of Suffolk which has tax records which show the actual taxable status of all real property located in the various towns of the County of Suffolk is the County Treasurer himself.

That as a result, said Section 71 further provides:

> "and at the *bottom* of said bill shall be *printed:* Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer."

That it is believed that this Court will take judicial notice of the fact as did the New York Court of Appeals, that the Suffolk County Tax Act mandates the tax description of all real property in the various Towns of the County of Suffolk, must appear on the *front* or *face* of said tax bills, and that on all of the tax bills of the various Towns of the County of Suffolk there must also appear on the front or face of said bills:

(1) The name and address of the assessed owner.

(2) The Acreage, School District in which the premises are located.

(3) The code, assessed valuation, the amount of tax due.

(4) When taxes are due and payable.

(5) All other mandatory notices.

The only question presented in this case is did the taxing authorities comply with the provisions of Sec. 71 SCTA? Justice William R. Geiler, in his memorandum (A137) states,

> "The Legislature had an opportunity to expressly change or modify Section 71 SCTA. They chose not to do so . . . This Court will not change Section 71 SCTA by implication in view of the fact that the Legislature, if it intended to change Section 71 SCTA, refused to expressly modify or change the mandatory requirements of said section."

Furthermore, an examination of Sections 70 and 71 of the SCTA indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at page 412:

> "It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arise. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subject."

The fact that, if the contentions of the appellees Rogers are upheld, a great deal of confusion will follow, is not the question involved in this case. The only question involved in this is, "Did the taxing authorities comply with the provisions of Sec. 71 SCTA, so as to deprive the appellees Rogers of their real property, without the mandated notice as required by said Section 71 SCTA? Any disasterous

results of this ruling is not the fault of the appellees "Rogers" but is the fault of the taxing authorities of the Town of Babylon and appellants in the County Appeals" herein.

Conclusion

For the reasons given above (1) the Appeal of Chester F. Jacobs as County Treasurer of Suffolk County, and the County of Suffolk of the State of New York (appellants in the County Appeal No. 220 October Term, 1970, and (2) the Appeal of the Pact Realty Corp. (the appellant in the Pact Appeal No. 221 October Term, 1970) from the Judgment (Order and Remittitur) of the Court of Appeals of the State of New York, entered March 5, 1970, on direct appeal to this court pursuant to Title 28 U.S.C.A., 1257 (2) on the grounds that said judgment construing Sec. 71 of Chapter 152 of Laws of 1929 (N. Y.) and construing Section 70 as amended by Chapter 745 of Laws of 1959 N. Y. in this case, to the prejudice of both of said "appellants" in a manner repugnant to the United States Constitution should be dismissed because of the fact that this Court lacks jurisdiction to review the aforesaid Judgment of the Court of Appeals of the State of New York.

In the alternative, the aforesaid judgment should be affirmed, because the questions asserted are so insubstantial as not to warrant further judicial review.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

ARTICLE I, Sec. 10. Restrictions upon powers of states (first paragraph)

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

AMENDMENT (V) Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE I, Sec. 6 (last paragraph)

> No person shall be deprived of life, liberty or property without due process of law.

Appendix A.

SUFFOLK COUNTY TAX ACT

Section 53.

Sec. 53. Conveyance of Property Not Redeemed. If such real estate, or a part thereof, be not redeemed as herein provided the county treasurer shall execute to the purchaser, including the county, its or his heirs, successors, or assigns, upon the performance by such purchaser of the conditions herein provided, and upon surrender of said certificate of sale or upon delivery of a release of such real estate to the grantee as herein provided and upon the purchaser's taking and paying for an assignment of all outstanding prior tax liens held by the county upon the premises, including all unpaid taxes appearing in the book or books which the county treasurer is authorized and empowered to compile and maintain pursuant to the provisions of chapter one hundred five of the laws of nineteen hundred twenty, and upon the filing of proof of service of notice upon owners and other interested persons as herein and in the general tax law provided, a conveyance of real estate so sold, which conveyance shall vest in the grantees an absolute estate in fee. The county treasurer shall be entitled to demand and receive from such grantee, for the use of the county, the sum of five dollars for preparing such conveyance. Every such conveyance shall be attested by the county treasurer and the seal of the county treasurer attached thereto, and when so executed shall be presumptive evidence that the sale was regular, and also presumptive evidence that all proceedings prior to the sale, including the assessment of the lands sold, and all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and according to law. After three years from the date of record of any conveyance in the Suffolk County

clerk's office, such presumption shall be conclusive. Every certificate of sale or conveyance executed in pursuance of this act may be recorded in the same manner and with like effect as a deed acknowledged or proved before any officer authorized by law to take proof and acknowledgment of deeds. Two or more lots or parcels of real estate sold to the same person may be included in the same tax deed. (Added by Chapter 152, Laws of 1929, in effect March 28, 1929; amended by Chapter 140, Laws of 1941, in effect March 20, 1941; amended by Chapter 552, Laws of 1953, in effect April 6, 1953; amended by Chapter 26, Laws of 1967, in effect February 28, 1967.)

§ 70. County treasurer to furnish supervisors with list of arrears. The county treasurer shall make a complete list of all taxes and assessments in arrears and shall file with each town supervisor, on or before the first day of September of each year, a list of all arrears of taxes and assessments on property in such town. All sales of property for nonpayment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 152 Laws of 1929, in effect March 18, 1929)

§ 71. Bill of Taxes to Show Arrears. There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land "Arrears" and at the bottom of said bill shall be printed "Whenever any tax or

assessment shall remain unpaid for six months from February first, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer." (Added by Chapter 152, Laws of 1929, in effect March 18, 1929.)

§ 70. *County Treasurer to Furnish Supervisors with List of Arrears.* Following each tax sale the county treasurer shall make and shall file with each town supervisor, on or before the first day of September of each year, a list of all property sold for unpaid taxes and assessments in such town remaining unredeemed. All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 745, Laws of 1959, in effect April 23, 1959)

§ 52. *Notice of Unredeemed Real Estate: Notice to Redeem.* 1. Notice of unredeemed real estate shall be given and published by the county treasurer at least three months before the expiration of the thirty-six months allowed for the redemption of real estate sold by him for taxes and assessments, the last publication to be at least six weeks before the expiration of such thirty-six months, and in all other respects shall be as provided in the real property tax law.

2. Whenever by any provision of the real property tax law it is provided that any notice may or shall be given or

filed within a period measured by reference to the time allowed for the redemption of real estate sold for taxes and assessments or by reference to the time of the sale, such provisions shall be construed as referring to the thirty-six month period for redemption herein provided as respects such sales in Suffolk county. Notices required to be served upon occupants of real estate or other pursuant to the real property tax law in relation to the redemption of such real estate from tax sales shall state that such real estate may be redeemed upon the payment of the moneys specified by law to be paid upon the redemption of such real estate.

3. Notice shall be given by the purchaser of any real estate sold for taxes under the provisions of this act in the manner and under the terms prescribed by the real property tax law and notice to redeem from any such sale and notice to occupants shall be made and given as provided by such law. The provisions of the real property tax law relating to redemption shall continue to apply to the matters covered thereby, except as herein otherwise provided, and except that the rate of interest to be paid upon any redemption shall be at the rates fixed by this act. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 960, Laws of 1958, in effect October 1, 1959.)

REAL PROPERTY TAX LAW

§ 1010. Redemption

1. The owner, occupant or any other person may redeem any real property sold for taxes at any time within one year from the last day of sale by paying to the county treasurer, for the use of the purchaser or those claiming under him, the sum mentioned in the certificate of sale with interest thereon at the rate of ten per centum per

annum computed from the date of such certificate. In addition there shall be paid (a) the amount of any tax, special ad valorem levy or special assessment, including penalties and interest thereon prescribed by law, on such real property which the purchaser has paid after the sale and prior to the date of redemption with interest thereon at the rate of ten per centum per annum from the date of payment provided the county treasurer has been notified immediately upon such payment and (b) such amounts as may have been paid by the purchaser to redeem such property from prior or subsequent tax sales with interest thereon at the rate of six per centum per annum from the date of payment.

§ 1014. Notice of unredeemed lands

1. The county treasurer shall, at least three months before the expiration of the one year allowed for the redemption of lands sold by him for taxes, cause commencement of publication of a notice once a week for six successive weeks in the newspapers designated by the board of supervisors of the county for the publication of concurrent resolutions, such notice to contain a list of the lands in the county sold for taxes and unredeemed, specifying particularly every parcel unredeemed, the amount necessary to redeem the same computed to the last day in which such redemption can be made and stating that unless such lands are redeemed on or before such day they will be conveyed to the purchaser.

SECTION 32 (SUFFOLK COUNTY TAX ACT)

SEC. 32. APPLICATION OF TAX LAW. The tax law shall apply and govern in all matters relating to taxation in Suffolk County not inconsistent with the provision of this act. (Chapter 311, Laws of 1920, in effect April 22, 1920.)

Appendix A.

Section 75 (Suffolk County Tax Act)

Sec. 75. Payment of Taxes By Purchaser: Penalties Thereon. The owner or holder of a certificate of sale of lots or parcels of real estate purchased at the tax sale, provided for herein may at any time after annual return of taxes and assessments to the county treasurer by the receiver of taxes, pay to the county treasurer any such and older taxes or assessments as are a lien on such property, and the holder of such certificate making such payment of said taxes shall be entitled to and shall receive the full amount of the taxes thus paid with interest and penalties thereon from the date of payment at the same rate prescribed in section forty-five hereof, provided such purchaser shall have notified the county treasurer thereof immediately upon the payment of any such tax. Such taxes with the same interest and penalties thereon from the date of such payment as herein provided shall become a lien on said property and payable at the time of the redemption thereof, or out of the proceeds realized at the sale of said property under the foreclosure of the certificate of sale as provided in this act. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929.)

28 United States Code, Section 1257 (2)

Final judgment or decree rendered by the highest court of a State, in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By Appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United

States, and the decision is in favor of its validity.

3018 (B) of Civil Practice Law and Rules of the State of New York.

(b) Affirmative Defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

APPENDIX B

Judgment of the Court of Appeals of the State of New York, Dated March 5, 1970

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of March in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS, The HON. STANLEY H. FULD,
Chief Judge, *Presiding*
RAYMOND J. CANNON, *Clerk.*

Remittitur March 5, 1970.

---

2. No. 400 69

William Rogers & ano., &c.,
Respondents,

vs.

Pact Realty Corp., & ors., &c.,
Appellants.

Be it Remembered, That on the 4th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Pact Realty Corp. & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Moses

Krivis, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And William Rogers & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Elwood D. Hooper, their attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Moses Krivis, of counsel for the appellant Pact Realty, and by Mr. Stanley S. Corwin, of counsel for the appellants Jacobs and County, submitted by the appellant Town; and argued by

Mr. William M. Johnson, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York.
Court of Appeals, Clerk's Office,

Albany, March 5, 1970.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON

Clerk.

APPENDIX C

Memorandum Opinion of the Appellate Division, Second Department

WILLIAM ROGERS, et al., Respondents, v. PACT REALTY CORP., et al., Appellants.—Judgment of the Supreme Court, Suffolk County, dated January 23, 1969, modified, on the law, by inserting in the second ordering paragraph, following the word "answers", the words "to the amended complaint"; and by adding a paragraph severing the cross claims of defendant Pact Realty Corporation against the other defendants. As so modified, judgment affirmed, with one bill of $10 costs and disbursements to respondents, jointly against appellants filing separate briefs. In our opinion, the tax sale and the tax deed to defendant Pact Realty Corp., based on default in paying the second half of the 1963-64 taxes, were invalid because of the failure to have the word "Arrears" noted on the 1964-65 tax bill as required by section 71 of the Suffolk County Tax Act. (See *Hutch* v. *Platt*, 32 A D 2d 925.) The instant case does not involve the validity of a tax or assessment and the provisions of section 63 of the Suffolk County Tax Act are therefore inapplicable. We find no grounds for disturbing the Special Term's determination, except as herein modified, in any of defendants' other contentions. The judgment is modified to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term. Christ, Acting P.J., Brennan, Rabin, Munder and Martuscello, JJ., concur.

APPENDIX D

Memorandum Opinion of Mr. Justice William R. Geiler, Justice of the Supreme Court, Suffolk County, State of New York

MEMORANDUM
Motion No. 2748
Ind. No. 164, 335
9/3/68

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS, as County Treasurer of the COUNTY OF SUFFOLK, and the COUNTY OF SUFFOLK,

Defendants.

By GEILER J.S.C.
Dated November 25, 1968

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Appendix D.

Motion by defendant Pact Realty Corp. (hereinafter referred to as Pact) for summary judgment dismissing the complaint and cross motion by plaintiffs for summary judgment.

Plaintiffs instituted this action pursuant to Article 15 of the Real Property Law of the State of New York, to set aside a tax deed executed and delivered by defendant Treasurer of the County of Suffolk (hereinafter referred to as Treasurer) to Pact.

Plaintiffs admittedly failed to pay the second half of the 1963/64 taxes on their property located in the Town of Babylon, County of Suffolk. Pact purchased the subject property at a tax sale on November 16, 1964. The property was not redeemed within the 36 month redemption period and the Treasurer delivered a tax deed to Pact on January 28, 1968. Pact recorded the deed on January 31, 1968.

The parties herein have stipulated to the following facts:

1. The tax bill for 1964/65 and the assessment roll for 1964/65 did not have the word "arrears" stamped thereon.

2. The "County Treasurer's Notice" was not printed on the bottom of the face side of the tax bills from 1963/64 through 1967/68 but was printed on the reverse side of said tax bills.

3. The "County Treasurer's Notice" provides:

> "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

4. All of the above mentioned tax bills did not have a ruled column for arrears printed thereon.

Plaintiffs contend that the tax sale herein was void because the provisions of Section 71 of the Suffolk County Tax Act (hereinafter referred to as S.C.T.A.) were not strictly complied with by the taxing authorities. They especially argue that Section 71 of the S.C.T.A. required that arrears be noted on the 1964/65 tax bill and that the "County Treasurer's Notice" must be printed on the bottom of the front side of the tax bill.

Pact maintains that the plaintiffs have given an erroneous interpretation to Section 70 of the S.C.T.A. and therefore their contentions are without merit. The tax sale purchaser specifically asserts that the word "arrears" was not required to be noted on the 1964/65 tax bill because of the "operation of Section 70 of the S.C.T.A. as amended in 1959." Pact also argues that the printing of the "County Treasurer's Notice" on the bottom of the reverse side of the tax bill complies with the requirements of Section 71 of the S.C.T.A.

Furthermore, Pact contends that plaintiffs' action is barred by the Statute of Limitations as contained in Section 63 of the S.C.T.A.

Section 71 of the S.C.T.A. provides:

"SEC. 71. BILL OF TAXES TO SHOW ARREARS.

There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land 'Arrears' and at the bottom of each bill printed 'Whenever any tax or assessment shall remain unpaid for six months from February First, the

property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer.'"

What was the purpose of the Legislature in enacting Section 71 of the S.C.T.A.? Why did they so minutely describe what must be contained in each tax bill? Why is the tax bill so important?

The tax bill is the only actual or personal notice a property owner receives with reference to the taxable status of his property in Suffolk County. He will receive no other notice of the taxable status of his property unless the property is to be sold for unpaid taxes due thereon. Then the only notice he receives is that of the sale and this notice is not given personally but only by publication as prescribed by Sections 42 and 43 of the S.C.T.A.

The Legislature, cognizant of these facts, wanted to make certain that the property owner was made aware of any possible loss of his property because of unpaid taxes. They wanted this notice to be given in such a manner so as to alert not only the knowledgeable but also the uninformed property owner.

What was the best way to accomplish their purpose? How could they make even the most unsuspecting property owner aware of any tax monies due and owing?

The Legislature came to the conclusion that their purpose could best be achieved by mandating the format of the tax bill which every property owner receives. They therefore determined that the front of all tax bills in Suffolk County should contain certain items from which a property owner, regardless of his knowledgeability of real estate taxes, could determine, at a glance, if there were any tax arrears and the title of the County official from

whom the property owner could obtain such vital information. Hence, Section 71 was enacted and has not been amended to date.

The 1963/64 tax bill admittedly does not conform to the exact provisions of Section 71 of the S.C.T.A. Must there be strict compliance with Section 71? Is the failure to follow Section 71 fatal to a tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila* v. *Mitrany*, N.Y.L.J., December 24, 1965, P. 10, Col. 5, affirmed by the Court of Appeals, 21 N. Y. 2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However, sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note 'arrears' on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court is guided by decisional law contained in the case of Ierna v. Maranzano, 211 N.Y.S. 2d 616, Erlwein v. Patchogue Homes Corp., 43 Misc. 2d 707, 252 N.Y.S. 2d 220 and Proschieck v. Erlwein, N.Y.L.J. 7/31/64, p. 8, col. 5, Aff'd 22 A. D. 2d 1018, leave to appeal denied 15 N. Y. 2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission of the word 'Arrears' on a subsequent tax bill, held that the provisions of Section 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance."

Appendix D.

Pact maintains that neither *Stebila, supra,* nor the "arrears" cases cited therein are determinative of the issues herein because these cases were decided prior to the 1959 amendment of Section 70 S.C.T.A. The tax sale purchaser contends that Section 70 of the S.C.T.A., as amended in 1959 controls Section 71 S.C.T.A. and by its operation "arrears" was not required to be noted on the 1964/65 tax bill.

Section 70 of the S.C.T.A. as amended in 1959 reads as follows:

> "§ 70. County treasurer to furnish supervisors with list of arrears. *Following each tax sale the* county treasurer shall make a [complete list of all taxes and assessments in arrears] and shall file with each town supervisor, on or before the first day of September of each year, a list of all [arrears] of *property sold for unpaid* taxes and assessments on property in such town *remaining unredeemed.* All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word 'arrears' after the description of each parcel of land as shown on the above mentioned list."
>
> (NOTE: Changes or additions in text are indicated by *italics*, deletions by brackets).

Pact's position is based on the following syllogism:

1. Plaintiffs' property was sold in November, 1964.

2. The County Treasurer, by virtue of Section 70 S.C.T.A., was not required to file with the Town of

Appendix D.

Babylon a list, showing plaintiffs' property sold for unpaid taxes, until September 1, 1965.

3. Section 70 S.C.T.A. states that "all sales of property for non-payment of such taxes or assessments shall be considered arrears." [Note this provision was also in Section 70 prior to 1959 Amendment].

4. The meaning of arrears is limited to property sold for non-payment of taxes.

5. Arrears did not exist until after the sale of plaintiffs' property.

6. The Town of Babylon did not receive the list of arrears (property sold for unpaid taxes) from the County Treasurer until after the tax bills for the year 1964/65 were sent out in December 1965.

7. Thus, "arrears" was not required to be noted on the 1964/65 tax bill.

Plaintiffs' position is untenable. It is based on a definition of "arrears" which has been refuted by Justice Ritchie of this Court in the case of *Erlwein* v. *Patchogue Homes Corp.*, 252 N.Y.S. 2d 220, at page 223:

> "* * * the interpretation of the word 'Arrears', as included in the Suffolk County Tax Act means only those arrears that have been established by a sale of the property for unpaid taxes.
>
> The Court does not agree with plaintiffs' contention."

What if no one purchased a particular piece of property offered at a tax sale because of non-payment of taxes? Does this mean, because the property is not sold, that

there are no arrears? Doesn't the tax receiver, in the first instance, determine if there are arrears?

Thus it is clear that "arrears" was never intended to be limited to mean property sold for unpaid taxes. The only reasonable definition of "arrears" is its ordinary usage as defined in Black's Law Dictionary, 4th Edition, at page 140: "Money unpaid at due time."

This Court does not agree with Pact's contention that the Legislature modified or changed the mandatory provisions of Section 71 S.C.T.A. by the amendment to Section 70 S.C.T.A.

McKinney's Statutes, Section 73 states at page 110:

> "The Constitution of this State vests the Legislative power in the Senate and Assembly and that the Courts may not divest or usurp that power has been announced so frequently and in such varying language to defy repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare and enforce the law, not to make it. No matter what disastrous consequences may result from following the expressed intent of the Legislature the Judiciary cannot avoid its duty. * * * They may not by interpretation add to or take from a clear and positive legislative mandate or substitute that which must be brought into existence by legislative mandate * * * but public policy or opinion should not sway the judiciary to read into a statute that which the Legislature might have inserted but did not. * * *".

The Legislature had an opportunity to expressly change or modify Section 71 S.C.T.A. They chose not to do so. This Court will not change Section 71 S.C.T.A. by implication in view of the fact that the Legislature, if it intended

to change Section 71 S.C.T.A., refused to expressly modify or change the mandatory requirements of said section.

Furthermore, an examination of Sections 70 and 71 of the S.C.T.A. indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at Page 412:

> "It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arises. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by a fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subjects."

Defendants are also erroneous in their contention that plaintiffs' action is barred by Section 63 S.C.T.A. Section 63 basically provides that an action to attack the validity of an assessment must be commenced within two years from the date of the receipt of the warrant by the receiver of taxes.

The plaintiffs are not attacking the validity of the assessment. They admit that the assessment is valid and thus Section 63 has no application herein.

The only section of the S.C.T.A. which is germane herein with reference to a statute of limitation period is 53. However, this action has been brought within the statutory period provided therein and therefore Section 53 is not an issue.

The Court abhors a forfeiture. It will not permit the plaintiffs, who have timely acted, to forfeit their real property because of the failure of the taxing authorities to comply with the provisions of Section 71 S.C.T.A.

The tax sale and deed are hereby declared invalid.

Plaintiffs' cross motion is granted and defendants' motion is denied.

Settle judgment.

WILLIAM R. GEILER
J. S. C.

APPENDIX E

Memorandum Amending Memorandum of November 25, 1968

MEMORANDUM

Motion No. 2748 9-3-68
Index No. 164, 335

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS as County Treasurer of the COUNTY OF SUFFOLK and the COUNTY OF SUFFOLK,

Defendants.

By GEILER, J.S.C.
Dated January 13, 1969

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Appendix E.

The Court, on its own motion, amends the decision dated November 25, 1968 to correct a typographical error on page 5 of the decision. The first sentence on page 5 shall read as follows:

"Pact's position is untenable . . ."

WILLIAM R. GEILER
J. S. C.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 5 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 220

CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the County of Suffolk of the State of New York,

Appellants,

v.

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORP. and TOWN OF BABYLON, of the State of New York,

Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 221

WILLIAM ROGERS and ROSE ROGERS, his wife,

Appellees,

v.

PACT REALTY CORP.,

Appellant,

TOWN OF BABYLON of the State of New York,

CHESTER JACOBS, as County Treasurer of the State of New York, and the County of Suffolk of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

AMENDMENTS TO "APPELLEES ROGERS" MOTION TO DISMISS OR AFFIRM

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AMENDMENTS TO "APPELLEES ROGERS" MOTION TO DISMISS OR AFFIRM

That the "Appellees Rogers" in their Motion to Dismiss the two appeals in this case ("County Appeal #220") and ("Pact Appeal #221") October Term 1970 among the points in support of said "Motion" Nine in number, is Point VIII entitled

"The case of I. Jack London v. Richard Hammel, New York Court of Appeals 6/15/70"

That at the time that the motion papers to Dismiss or Affirm, pursuant to Rule 16 of this Court were prepared, the only copy of said decision that was available was an unofficial copy obtained from unofficial reports of decisions generally found in Supreme Court Law Libraries of the State of New York, which was used in this case (p. 43).

That it is also stated in Point VIII (p. 42) that at the time the moving papers were prepared (p. 42) that an official certified copy of said decision had been ordered from the Court of Appeals of the State of New York (p. 42) and that upon receipt thereof the original certified copy would be filed with the "Motion to Dismiss" in this Court in lieu of the unofficial decision (p. 43).

That the Motion to Dismiss of the "Appellees Rogers" was filed in this Court on July 24th, 1970.

That on July 30th, 1970, a copy of the foregoing decision, with certification attached (dated July 29th, 1970), was received by the attorney for the "Appellees Rogers".

That the following decision, with certification annexed thereto, is now submitted to this Court to be filed with the original "Motion to Dismiss or Affirm" of the "Appellees Rogers" filed in this Court on July 24th, 1970 in lieu of the aforesaid unofficial decision (p. 43).

Certification.

STATE OF NEW YORK
COURT OF APPEALS,
STATE REPORTER'S OFFICE } ss.:

I, JAMES M. FLAVIN, State Reporter of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of London v. Hammel decided by the Court of Appeals on the 15th day of June 1970, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature as State Reporter, at the City of Albany, in the State of New York, this 28th day of July 1970.

JAMES M. FLAVIN,
State Reporter of the State of New York.

(SEAL)

Attest:

L. S. RAYMOND J. CANNON
Clerk of the Court of Appeals.

STATE OF NEW YORK }
COURT OF APPEALS }

I, STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that RAYMOND J. CANNON is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that JAMES M. FLAVIN is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of

London v. Hammel

decided by the said Court of Appeals on the 15th day of June 1970, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of RAYMOND J. CANNON, as clerk of said court, appended thereto is the true and genuine signature of said RAYMOND J. CANNON, and the signature of JAMES M. FLAVIN, as State Reporter, appended thereto is the true and genuine signature of said JAMES M. FLAVIN.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York on the 29th day of July in the year one thousand nine hundred and seventy.

STANLEY H. FULD,
Chief Judge of the Court of Appeals of the State of New York.

JACK LONDON, Appellant, v.
RICHARD HAMMEL, Respondent.

Decided June 15, 1970.

MEMORANDUM. The order of the Appellate Division should be reversed and the case remitted to Supreme Court, Suffolk County, for the entry of judgment in favor of plaintiff-appellant London on his first cause of action.

Section 52 (subd. 1) of the Suffolk County Tax Act (added by L. 1929, ch. 152, and amd. by L. 1958, ch. 960, § 29) requires, before expiration of the period for redemption of land sold at tax sales, publication of a notice of unredeemed real estate, containing, as provided in section 1014 (subd. 1) of the Real Property Tax Law, "the amount necessary to redeem the same computed to the last day in which such redemption can be made". Section 75 of the Suffolk County Tax Act, authorizing a tax sale purchaser to pay taxes on the property not paid by the owner of record, requires that these taxes, plus interest and penalties, be paid by the owner of record at the time of redemption (see, also, Real Property Tax Law, § 1010, subd. 1, par. [a]). The failure of the County Treasurer to include this additional sum in the published notice, when the payment of taxes by the purchaser was already known to him at the time of publication, is a substantial deviation from the mandate of the statute. The statutory provision, *for the benefit of the owner, should be strictly construed in his favor, even if he may have eventually received notice* of the correct amount by methods *other* than *required by the statute.* The tax deed is, *therefore, void,* and the owner should be permitted to redeem the property. (Cf. *Rogers v. Pact Realty Corp.*, 26 N. Y. 2d 872; *Stebila* v. *Mitrany,* 21 N. Y. 2d 930; *Clason* v. *Baldwin*, 152 N. Y. 204, 209-211.) (emphasis supplied)

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel, Jasen and Gibson concur.

Order reversed, without costs, and case remitted to Supreme Court, Suffolk County, for further proceedings in accordance with the memorandum herein.

That in addition the heading to Point IX, which was taken from the brief submitted to the Court of Appeals of the State of New York by the Plaintiffs-Respondents (Rogers) in said Court of Appeals, which now reads as follows

"ANY DISASTEROUS RESULTS OF SPECIAL TERM'S DECISION IS NOT THE FAULT OF THE 'PLAINTIFFS RESPONDENTS', BUT IS THE FAULT OF THE TAXING AUTHORITIES OF THE TOWN OF BABYLON AND THE COUNTY OF SUFFOLK," should be corrected to read as follows:

POINT IX

ANY DISASTEROUS RESULTS OF SPECIAL TERM'S DECISION IS NOT THE FAULT OF THE "APPELLEES ROGERS" BUT IS THE FAULT OF THE TAXING AUTHORITIES OF THE TOWN OF BABYLON AND THE COUNTY OF SUFFOLK, OF THE STATE OF NEW YORK.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 17 1970
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970
Case No. 221

WILLIAM ROGERS and ROSE ROGERS, his wife,
Appellees,

-against-

PACT REALTY CORPORATION,
Appellant,

TOWN OF BABYLON of the State of New York, CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the COUNTY OF SUFFOLK OF THE STATE OF NEW YORK,
Defendants-Appellees,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Case No. 220
CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the COUNTY OF SUFFOLK OF THE STATE OF NEW YORK,
Appellants,

-against-

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORPORATION, and TOWN OF BABYLON OF THE STATE OF NEW YORK,
Appellees,

REPLY MOTION TO DISMISS OR AFFIRM

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Appellees,

Appellees, by this motion to dismiss, bring before this Court, preliminary to a discussion of the merits, their arguments why this Court should decline jurisdiction. These arguments may be paraphrased under the following broad headings to which this reply is addressed:

1. The Suffolk County Treasurer did not have the power to enter into a contract to sell the subject land with Appellant, Pact Realty Corp. (hereinafter referred to as Pact), the buyer at the 11/16/1964 tax sale. Therefore there was no contract which might be impaired.

2. Even if the Treasurer had the power to enter into a contract, this power could be excercised only in those instances when Suffolk County had first acquired title.

3. If a contract had been entered into, Pact complains of "judicial impairment" which is not reviewable by this Court.

4. Appellant has not raised the constitutional questions below in proper form and the State Courts did not expressly pass on any Federal questions.

POINT I

THE APPELLEES' CONCLUSION THAT THE TREASURER DID NOT HAVE THE POWER OR AUTHORITY TO ENTER INTO A CONTRACT OF SALE IS CONTRADICTED BY THE SUFFOLK COUNTY TAX ACT

The Suffolk County Treasurer was mandated by § 40 of the Suffolk County Tax Act (hereinafter called SCTA) to collect all unpaid taxes "upon real estate ... by a *sale of the real estate by the county treasurer...*"

§ 43 SCTA orders the "ADVERTISEMENT OF SALE" to be published containing a "list of all real estate...*to be sold for unpaid taxes*...at public auction (to the tax sale bidder of) the lowest rate of interest."

§ 45 SCTA authorizes the County Treasurer at the tax sale to "commence the *sale of lands*... until every such lot or *parcel is sold*...for an amount sufficient to pay all the taxes..." (emphasis added)

Basically, the only legal relationship created at the tax sale between the successful bidder and the Treasurer was that of buyer and seller. At the precise moment of the acceptance of the buyer's bid a contract necessarily came into being.

Appellant asks what did take place at the tax sale? The appellees want this Court to believe that: (a) the sale was void; (b) that nothing took place at the tax sale; that a mere vacuum came into being at that time; (c) that the Treasurer and Pact went through meaningless motions when the Treasurer sold and Pact bought the subject property at the tax sale; (d) that the Treasurer was not vested with the power to sell the subject property; (e) that Pact bought nothing at the tax sale; (f) that even though Pact paid out its money, as consideration at the tax sale, it got no vested interest in the real property; (g) that the basis for all of the foregoing fallacious reasoning by appellees is that *15 days after the tax sale*, on 12/1/64, the 1964-65 tax bill was rendered without an "arrears" stamp.

A mere statement of the foregoing demonstrates the falsity of Appellees' position. Appellees cannot evade the constitutional fact that a valid contract took place at the tax sale under which Pact's property rights became fixed. These

rights could not constitutionally be taken from Pact without due process.

In summation, the SCTA empowers the Treasurer *to sell the land* in order to collect the unpaid taxes, incorporating therein the power *to contract to sell* the land at the tax sale to the successful bidder therefor. Thus a valid contract came into being at the tax sale which Pact claims has been impaired.

POINT II.

NEITHER THE SCHEME OF THE SUFFOLK COUNTY TAX ACT NOR THE AUTHORITIES OF NEW YORK STATE CASE LAW REQUIRES THE COUNTY TO FIRST ACQUIRE RECORD TITLE BEFORE SELLING REAL PROPERTY AT THE TAX SALE

Under Point I of this reply we respectfully called the Court's attention to the relevant portions of the SCTA relating to the Treasurer's authority to sell. Those sections do not require the County to first obtain title. To the contrary, they establish the procedure to sell without reducing the record title into the name of the County.

Appellees contend that *Wood v Lovett*, 317 US 362, stands for the proposition that a sale could be consummated only where the sovereign first had title. In *Wood v Lovett*, supra the State of Arkansas had already acquired title. In Suffolk County, New York, the procedure is different, the land is sold at the tax sale, the County is not required to have the record title to the property in order to sell it for unpaid taxes.

In this case there was no dispute that the Treasurer had

performed every condition precedent to vesting in him the power to duly sell the subject property to Pact, at the public tax sale auction of 11/16/64. Both the Treasurer and Pact possessed the uninhibited capacity to contract for the sale of the subject land at the tax sale, which they proceeded to do. At that precise moment of the meeting of the minds, when the Treasurer sold and Pact, for a valuable consideration, bought the subject property, a valid contract came into being. This contract vested in Pact positive, definable property rights, *Clarke v Mayor of NYC*, 111 NY 621, 623-624, where the N. Y. Court of Appeals stated:

> "The taxes were properly imposed; they remained unpaid and a sale was authorized by statute; it was conducted in conformity to law, and *at that moment the rights of the parties* to the transaction became fixed. The vendor was entitled to the price bid, the purchaser to have a valid certificate, and in due time, upon the happening of the contingencies named in the statute a lease.
>
> If those he has obtained are invalid...by reason of the omission of any statutory condition or irregularity... the defects do not impair the sale, and consequently leave in full force the *contract* upon which he paid his money."(emphasis added)

There is further authority in New York State for the doctrine that at the Suffolk County tax sale the property itself is sold. *In Re Ueck's Estate*, 286 NY 1, 18 is authority for the doctrine that at the tax sale the tax sale buyer "...became the *inchoate title holder* of the land, evidenced by the tax sale certificate", (emphasis added), subject to defeasance only by the former owner's privilege of redemption. *Ueck* construed the Erie County Tax Act and the Buffalo City Charter, both of which contain substantially the

same language as is contained in the SCTA, under which the "*lands shall be sold* for an amount sufficient to pay all the taxes..." (§ 445 SCTA, emphasis added).

Confirming the doctrine of *Ueck* Mr. Justice Glickman in the Suffolk County Supreme Court (NY) case of *Harris v Board of Assessors of Town of East Hampton*, reported in NYLJ 11/27/68, P 19, Col. 4, stated:

> "While the purchaser at such sale in effect acquired the county's tax lien, in reality he *purchases the land* and may be divested of his right to the land *only by redemption* unless the tax sale itself is defective..." (emphasis added)

At the instant tax sale, the moment when the contract of sale was created, Pact's property rights became vested. These rights entailed that the Treasurer should execute a deed conveying "an absolute estate in fee" (§ 53 SCTA), *if* Appellees failed to redeem within 36 months, after due notice to redeem was published by the treasurer, as provided for by § 52 SCTA and § 1014 Real Property Tax Law (RPTL). When the Treasurer duly published said notice to redeem and Appellees failed to redeem, their rights were extinguished forever.

POINT III

APPELLANT CONTENDS THAT ANY STATUTE WHICH EMPOWERS A THIRD PARTY WHO IS UNRELATED TO THE CONTRACTING PARTIES, TO COMMIT OR OMIT ANY ACT AFTER THE MAKING OF A CONTRACT, WITH THE RESULT THAT THE CONTRACT BECOMES VOID, IS UNCONSTITUTIONAL.

This position is stated at page 8 of the Jurisdictional Statement. In developing this point it is submitted that on

11/16/64 Appellant entered into a valid contract with the Treasurer. If the contract was valid in creation no subsequent act of omission by the Babylon Town Receiver can destroy the validity of this contract. The NY Court of Appeals communicated this doctrine as early as *Hardman v Bowen*, 39 NY 196, when it stated at page 200:

> "If the assignment was valid in creation...no subsequent illegal act, either of omission or commission, can in any manner invalidate it."

To the same effect is *Mabie v Fuller*, 255 NY 194,202.

§ 71 SCTA is unconstitutional because it impairs the valid contract entered into between Appellant and the Treasurer by permitting Appellant's vested rights to be destroyed and permits the contract, validly created, to become void by an alleged act of omission by a third party (Receiver) who is not even described or named in the statute.

The application of § 71 SCTA is to be construed as of the date that the act complained of (omission of "arrears" stamp) is to be performed. Since that act was subsequent to the contract's creation, the "impairment" doctrine is applicable under the authority of *Williams v Bruffy*, 96 US 176. Any action authorized (under § 71 SCTA) by New York to be taken by an individual (Receiver), pursuant to that authority, is a State action. When that action is taken, the State intervenes at that moment. In the instant case that took place *after* the executed tax sale contract which vested in Pact its property rights.

Therefore, § 71 SCTA must be held to be unconstitutional as authorizing the impairment of a valid prior contract, repugnant to Article I, Sec. 10 of the U. S.

Constitution.

POINT IV

ALL THE CONSTITUTIONAL QUESTIONS RAISED BY APPELLANT BEFORE THIS COURT WERE RAISED BELOW

This case went before three Courts in New York, Special Term of the Supreme Court, the Appellate Division, 2nd Department and the N. Y. Court of Appeals. The constitutional questions raised before this Court were raised in every N. Y. Court.

Appellant raised the constitutional questions in its answer and elaborated thereon in its arguments and briefs before every tribunal. Appellees did not seek any relief by way of corrective motion or otherwise addressed to that part of the answer which raised the constitutional questions.

The N. Y. Courts have pointed out that under the N. Y. Civil Practice Law and Rules (CPLR), which became effective 9/1/63, the emphasis with respect to pleading, should be placed "upon the primary function of pleadings, namely that of adequately advising the adverse party of the pleader's claim of defense.", *Foley v D'Agostino*, 21 AD2d 60 (NY).

In the latter case it was further stated:

> "Finally, every pleading question should be approached in the light of the CPLR enactment that pleadings "shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

In a footnote of the Court's opinion the following quote

appears:

> "This is a statment of a fundamental tenet of modern practice; the pleadings and other forms of procedures are only a means to the end of resolving the controversy between the parties. Even if a pleading be technically in violation of some rule of good pleading, what does it matter if substantial rights of other parties are in no way prejudiced." (Wachtel, New York Practice, p. 108)

The Appellees failed to move for any amplification of the pleadings or for any corrective relief. That demonstrates that the Appellees understood the crux of the pleading and cannot now question the sufficiency thereof for the first time.

The record (R22) refers to "other arguments...on constitutional grounds" raised in the "accompanying memorandum of law". The same reference is made to "The constitutional questions raised herein, presented in my memorandum of law, as a matter of law, demonstrated the lack of a constitutional basis for the amended complaint's attack on the tax sale and tax deed." (R24). This indicates the fact that Appellees were alerted to the constitutional questions raised by Pact from the very start.

What is clear is that the constitutional questions were raised below.

POINT V

APPELLEES FAILED TO MEET PACT'S ARGUMENT THAT THE LOWER COURTS DEPRIVED PACT OF ITS PROPERTY RIGHTS WITHOUT DUE PROCESS

The Court of Appeals passed on all the foregoing constitutional questions presented before it. By affirming, without opinion, the lower Courts' determination, it in effect said that § 71 SCTA is constitutional and that, by its operation, the lower Courts constitutionally divested Pact of its property rights acquired at the valid tax sale and through the valid tax deed, without violating Pact's rights under the due process clauses of both the N. Y. and U. S. Constitutions.

The lower Courts' silence and failure to say a single word about the constitutional questions repeatedly presented by Pact must lead to the conclusion that the lower Courts held that the divestiture of Pact's title was proper on the grounds that Pact never had any property rights in the first place; that what took place at the tax sale was illegal because of a later act (omission of an "arrears" stamp on the later issued 1964/65 tax bill) to be performed by a party unnamed in § 71 SCTA, not connected with the tax sale contract; that the divestiture of Pact's property rights acquired at the tax sale could take place by the empowering of that third party, by design or accident, to so act (omitting "arrears" stamp) as to destroy the prior legal contract entered into between Pact and the County Treasurer.

We respectfully submit that Pact was deprived of its property in violation of the due process clauses of both the N. Y. and U. S. Constitutions.

In any discussion about the lower Courts due process accorded Pact, reference must be directed to another statute

of the State of New York. That statute is § 1160 RPTL.

Leaving aside for the moment the 1959 amendment to § 70 SCTA and its effect on § 71 SCTA, we must examine § 71 SCTA itself. Special Term had applied the doctrine of *Stebild v Mitrany*, 21 NY2d 9930, construing de jure 1959 370-71 SCTA, which upheld the theory that "omission of the word "Arrears" on a subsequent tax bill, held that the provisions of Section 70 and 71 SCTA are *mandatory* and require strict compliance." (R138) (emphasis added). Special Term repeats the phrase "mandatory requirements" (R143). Appellees argue about "the failure...to perform the duties imposed...by the *mandatory* and *jurisdictional* requirements...resulted in a nullification of said entire contract..." (P36-Motion). In other words, Appellees argue that the stamping of "arrears" was a "mandatory" act, and its omission on the 1964/65 tax bill on 12/1/64 reached back to *jurisdictionally* destroy the earlier valid tax sale of 11/16/64.

An examination of the language of § 71 SCTA shows no finding of the words "mandatory" or "jurisdictional". § 71 SCTA contains no negative words showing that the results of such an omission are to void the earlier tax sale (*LANCASTER SBICO v CITY OF NY*, 214 NY 1, 11-12). Lacking express language to that effect we must go to § 32 SCTA to find out if legislative intent was that the stamping of "arrears" was mandatory and if omitted, a jurisdictional defect in the earlier, valid tax sale.

§ 32 SCTA provides:

> "The tax law shall apply and govern in all matters relating to taxation in Suffolk County not inconsistent with the provisions of this act." (Ch 311, Laws 1920).

Proceeding to the general tax law we find § 1160 RPTL (1) which provides, in part:

> "All provisions with respect to procedure upon tax sales and sales of tax liens *requiring acts to be done* at or before specified times or dates...shall be *deemed directory* and failure to take such action...shall not invalidate or otherwise affect such tax lien nor prevent...proceedings...for collection thereof...*nor affect the title of the purchaser under such proceedings.*" (Ch 959, Laws 1958) (emphasis added)

In the face of this positive expression of legislative intent we ask where and how and by what reasoning have the lower Courts arrived at the conclusion that the provisions of § 71 SCTA are "mandatory" (R138)? The only answer is that the lower Courts did not obtain this information from the Legislature, but created, by judicial decree a Legislative intent that is directly contrary to expressed Legislative intent to treat the provisions of § 71 SCTA as directory only, preserve the sanctity of the tax sale and *to protect the title of the tax sale purchaser.*

It is respectfully submitted that there was no due process accorded to Pact; that it was divested of its property without due process, in violation of both the N. Y. and U. S. Constitutional provisions relating thereto.

POINT VI

THE CASE OF LONDON V HAMMEL IS NOT APPLICABLE HEREIN

Under their Point VIII Appellees raise the case of *London v. Hammel*, unreported, decided by the N. Y. Court of Appeals on 6/15/1970. This is not applicable here because (1) it did not involve an attack on the tax sale contract as was done herein; (2) it did not consider the constitutional questions that were raised by the instant case; (3) the Suffolk County Treasurer was not made a party defendant in the *London v. Hammel* case.

In order to demonstrate the importance of the Treasurer being made a party defendant *(Costa v. Harris*, 26 AD2d 933 (NY) in any attack on the tax sale contract or tax deed issued by him, we respectfully submit the following argument.

Had the Treasurer been a party before the New York Court of Appeals in *London* he could have raised the arguments that (1) The redemption period under the SCTA is 3 years, whereas the redemption period under the NY RPTL is 1 year. (2) With a one year redemption period there never could be any subsequent taxes paid by a tax sale buyer. Therefore, the situation that arose in *London* could never arise under the RPTL. (3) That the New York Legislature's enactment of the language of §1014 RPTL that the redemption advertising contain "the amount necessary to redeem the same computed to the last day in which such redemption can be made..." intended to refer to (a) the amount of the tax sale *and* penalties, interest and advertising costs; (4) That the Legislature had before it, when it passed the RPTL, only a one year redemption period, as covered by said RPTL and could not have had in mind applying the

language to a special local act like the SCTA where the redemption period was more than one year. (5) That § 32 SCTA (Ch 311, Laws 1920) provided that the general "tax law shall apply and govern the provisions of this act." (emphasis added). Therefore, applying the general tax law (RPTL) that concerned itself with a one year redemption period *was inconsistent* with the SCTA which authorized a three year redemption period.

Further, in the *London v. Hammel* case, the taxpayer *made an attempt* to redeem the tax sale bringing insufficient money to redeem *before* the expiration of the redemption period and he was told by the Treasurer's agent that he had additional two years time in which to redeem. It was not shown if, in reliance on that statement, the taxpayer did not return before the redemption period had expired.

The doctrine of *Van Benthysen v. Sawyer*, 36 NY 150, that it is a question of fact as to whether the action of the County Treasurer's agent prevented the redemption might have applied in *London*.

In the instant case, unlike what happened in *London*, Appellees made no attempt to redeem the 11/16/64 tax sale, *before* the expiration of the redemption period. Their attack on the instant tax sale contract was made *after* the redemption period had expired on the grounds mentioned in the complaint.

We respectfully submit that *London* must be restricted to solely the facts of that case and not be applied generally to the instant case where the question of the validity of the redemption advertising had not even been raised below.

Thus the *London v. Hammel* case is not applicable herein.

POINT VII

THE FAILURE OF THE NOTICE WHICH APPELLEES COMPLAINED THEY FAILED TO RECEIVE, BY OMISSION OF THE "ARREARS" STAMP ON THE 1964/65 TAX BILL, HAS TO BE A FAILURE OF A NOTICE TO REDEEM

The valid tax sale took place 11/16/64. The only method by which that tax sale can be eliminated is by redemption. Therefore any notice relating to that tax sale issued after the tax sale took place has to be a notice to redeem. The alleged failure of "notice of arrears...in the subsequent tax bill for the tax year 1964/65" (complaint, R40), to have been given on 12/1/64, when the 1964/65 tax bill was rendered is a notice to redeem from the earlier 11/16/64 tax sale.

The power to create what is a notice to redeem is reserved to the Legislature, under Article III, Sec. 1 of the N. Y. State Constitution. Thus Special Term's creation of the "arrears" omission as another notice to redeem was judicial legislation, violative of Article III, Sec. 1 of the N. Y. State Constitution.

Lastly, Appellees' statements contained in their Point IX are irrelevant to the motion now before this Court. Their irrelevancy make it unnecessary to make any extended remarks thereto.

CONCLUSION

The issues raised by this appeal are properly before this Court and Appellees' Motion to Dismiss should be denied.

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SECTION 32

SEC. 32. APPLICATION OF TAX LAW. The tax law shall apply and govern in all matters relating to taxation in Suffolk County not inconsistent with the provision of this act. (Chapter 311, Laws of 1920, in effect April 22, 1920).

SECTION 40.

SEC. 40, COLLECTION OF TAXES AND ASSESSMENTS SHALL BE ENFORCED BY SALE. The collection of every assessment and every tax upon real estate returned by the receivers of taxes as unpaid, with the interest and additions, shall be enforced by a sale of the real estate by the county treasurer, subject to the right as hereinafter provided of the purchaser or purchasers at such sale to change or convert such sale into a transfer of the tax lien or the right of the county to collect such taxes. Such sale shall be held within six months after the return of unpaid taxes to the county treasurer. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929).

SECTION 43.

SEC. 43. ADVERTISEMENT OF NOTICE OF SALE. The county Treasurer shall, within six months after the return, cause to be published at least once a week in each week, for six successive weeks, in the two newspapers, designated for the publication of concurrent resolutions, a list of all real estate so liable to be sold for unpaid taxes and assessments and together with a notice that said real estate will be on a day specified in such notice, and the succeeding days, be sold at public auction at the county center, Riverhead, Suffolk County, New York, or such other place within the county as the treasurer designates in such notice.

SECTION 43. (CONTINUED)

If the property affected is situated in a town other than that in which the newspapers designated as above required are located, those parcels so situated from such list and notice shall also be separately published in two successive issues of a newspaper in the town in which such affected property is located with such alternate newspaper to be designated by resolution of the board of supervisors. By such advertisement the owner or owners of such lands and tenements respectively shall be required to pay the amount of such tax or assessment, with the said penalties and interest thereon remaining unpaid with the charges of such notice and advertisement, to the county treasurer, and notice shall be given by such advertisement, that if default shall be made in such payment, such lands and tenements will be sold at public auction at a day and place therein to be specified for the amount of the taxes, together with the interest, penalties and other charges thereon, then a lien on such property, and for the lowest rate of interest during the period of redemption, or until such property be redeemed, at which any person or persons shall offer to take the same; such list shall contain the name of the owner or occupant of each piece of real estate to be sold, as the same appears upon the assessment roll of the year in which such unpaid taxes were levied, and a brief description of such real estate, and the total amount of such unpaid taxes, which said total amount shall include all taxes, interest expenses and other charges against the property for the year or years advertised.

2. This act shall take effect January first, nineteen hundred sixty-five.

SECTION 45.

SEC. 45. SALE OF PROPERTY FOR UNPAID TAXES. If the owner, mortgagee or occupant of or party in interest in such real estate do not pay such tax or assessment, with the costs additions and charges, within the period stated in such advertisement, then the county treasurer shall, without further notice, commence the sale of lands specified in such notice of sale on the day set for that purpose and continue the sale from day to day until every such lot or parcel is sold. Such lands shall be sold for an amount sufficient to pay all the taxes and assessments due thereon for the years for the taxes of which said sale shall be made with interest thereon to the time of sale, and all costs, expenses and charges accrued thereon and, subject to reductions as herein provided said amount paid for such property shall carry and bear the maximum interest and penalties as follows: Six per centum on the purchase price, if redeemed within six months of date of sale. An additional six per centum on purchase price if redeemed after the expiration of six months and within twelve months of the date of sale. An additional six per centum on the purchase price if redeemed after the expiration of twelve months and within a period of eighteen months of date of sale. An additional six per centum on the purchase price if redeemed after the expiration of eighteen months and within a period of twenty-four months of date of sale. An additional six per centum on the purchase price if redeemed after the expiration of twenty-four months and within a period of thirty months of date of sale. An additional six per centum on the purchase price if redeemed after the expiration of thirty months and within thirty-six months of date of sale. The rate of interest at which any person or persons shall offer to take the lot or parcel of land to be sold shall be established by his bid. The rate thus established shall be the

rate of interest for every period of six months or fraction thereof up to the time of the redemption of the property purchased and until the expiration of three years, plus all taxes paid by the purchaser with interest thereon at six per centum per annum to the date of payment. At such sale, rates of interest shall be bid in multiples of one per centum or a flat bid of no interest whatsoever and parcels shall be sold and bid upon separately. If more than one person bids the same rate of interest, the county treasurer or person conducting the sale shall sell the parcel to whichever of such bidder as he in his sole discretion shall determine. In any case, however, and as to any parcel, the county may reject any and all bids and bid in and purchase the same for the county at the maximum rate of interest in which event the bid of the county shall be preferred over all other bids. The county shall likewise be deemed the purchaser at the maximum rate of interest of all parcels which are not sold at such sale. The board of supervisors may by resolution exclude from sale such parcels as it determines where the county has entered into any agreement concerning the disposition of tax liens thereon with a tax district or other person pursuant to section one hundred sixty-six-a of the tax law or other provision of law. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 207, Laws of 1934, in effect April 13, 1934; by Chapter 175, Laws of 1937, in effect April 5, 1937; amended by Chapter 745, Laws of 1959, in effect April 23, 1959.)

Real Property Tax Law 1160(1)

(Chapter 959, Laws 1958)

1160. TAX SALE AND SALE OF TAX LIEN

1. It shall be the duty of the enforcing officer to enforce annually all tax liens by a tax sale, in accordance with the provisions of law governing the conduct of such sales, except

as otherwise provided herein. The failure of the enforcing officer to enforce such tax lien shall not impair the lien or prevent a sale or stay any other proceedings for its enforcement after the time specified. All provisions with respect to procedure upon tax sales and sales of tax liens requiring acts to be done at or within or before specified times or dates, except provisions with respect to length of notice, shall be deemed directory and failure to take such action at or within the time specified shall not invalidate or otherwise affect such tax lien nor prevent the accruing of any interest or penalty imposed for the non-payment thereof, nor prevent or stay proceedings under this article for any of the remedies for collection thereof in this article provided, nor affect the title of the purchaser under such proceedings.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 26 1970
E. ROBERT SEAVER, CLERK

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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Case No. 220
CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the COUNTY OF SUFFOLK OF THE STATE OF NEW YORK,
Appellants,

-against-

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORPORATION, and TOWN OF BABYLON OF THE STATE OF NEW YORK,
Appellees,

REPLY TO DISMISS OR AFFIRM

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Appellees, by this motion to dismiss, bring before this Court, preliminary to a discussion of the merits, their arguments why this Court should decline jurisdiction. These arguments may be paraphrased under the following broad headings to which this reply is addressed:

1. The Suffolk County Treasurer did not have the power to enter into a contract to sell the subject land with Appellant, Pact Realty Corp. (hereinafter referred to as Pact), the buyer at the 11/16/1964 tax sale. Therefore there was no contract which might be impaired.

2. Even if the Treasurer had the power to enter into a contract, this power could be excercised only in those instances when Suffolk County had first acquired title.

3. If a contract had been entered into, Pact complains of "judicial impairment" which is not reviewable by this Court.

4. Appellant has not raised the constitutional questions below in proper form and the State Courts did not expressly pass on any Federal questions.

POINT I

THE APPELLEES' CONCLUSION THAT THE TREASURER DID NOT HAVE THE POWER OR AUTHORITY TO ENTER INTO A CONTRACT OF SALE IS CONTRADICTED BY THE SUFFOLK COUNTY TAX ACT

The Suffolk County Treasurer was mandated by § 40 of the Suffolk County Tax Act (hereinafter called SCTA) to collect all unpaid taxes "upon real estate ... by a *sale of the real estate by the county treasurer...*"

§ 43 SCTA orders the "ADVERTISEMENT OF SALE" to be published containing a "list of all real estate...*to be sold for unpaid taxes*...at public auction (to the tax sale bidder of) the lowest rate of interest."

§ 45 SCTA authorizes the County Treasurer at the tax sale to "commence the *sale of lands*... until every such lot or *parcel is sold*...for an amount sufficient to pay all the taxes..." (emphasis added)

Basically, the only legal relationship created at the tax sale between the successful bidder and the Treasurer was that of buyer and seller. At the precise moment of the acceptance of the buyer's bid a contract necessarily came into being.

Appellant asks what did take place at the tax sale? The appellees want this Court to believe that: (a) the sale was void; (b) that nothing took place at the tax sale, that a mere vacuum came into being at that time; (c) that the Treasurer and Pact went through meaningless motions when the Treasurer sold and Pact bought the subject property at the tax sale; (d) that the Treasurer was not vested with the power to sell the subject property; (e) that Pact bought nothing at the tax sale; (f) that even though Pact paid out its money, as consideration at the tax sale, it got no vested interest in the real property; (g) that the basis for all of the foregoing fallacious reasoning by appellees is that *15 days after the tax sale*, on 12/1/64, the 1964-65 tax bill was rendered without an "arrears" stamp.

A mere statement of the foregoing demonstrates the falsity of Appellees' position. Appellees cannot evade the constitutional fact that a valid contract took place at the tax sale under which Pact's property rights became fixed. These

rights could not constitutionally be taken from Pact without due process.

In summation, the SCTA empowers the Treasurer *to sell the land* in order to collect the unpaid taxes, incorporating therein the power *to contract to sell* the land at the tax sale to the successful bidder therefor. Thus a valid contract came into being at the tax sale which Pact claims has been impaired.

POINT II

NEITHER THE SCHEME OF THE SUFFOLK COUNTY TAX ACT NOR THE AUTHORITIES OF NEW YORK STATE CASE LAW REQUIRES THE COUNTY TO FIRST ACQUIRE RECORD TITLE BEFORE SELLING REAL PROPERTY AT THE TAX SALE

Under Point I of this reply we respectfully called the Court's attention to the relevant portions of the SCTA relating to the Treasurer's authority to sell. Those sections do not require the County to first obtain title. To the contrary, they establish the procedure to sell without reducing the record title into the name of the County.

Appellees contend that *Wood v Lovett*, 317 US 362, stands for the proposition that a sale could be consummated only where the sovereign first had title. In *Wood v Lovett*, supra the State of Arkansas had already acquired title. In Suffolk County, New York, the procedure is different, the land is sold at the tax sale, the County is not required to have the record title to the property in order to sell it for unpaid taxes.

In this case there was no dispute that the Treasurer had

performed every condition precedent to vesting in him the power to duly sell the subject property to Pact, at the public tax sale auction of 11/16/64. Both the Treasurer and Pact possessed the uninhibited capacity to contract for the sale of the subject land at the tax sale, which they proceeded to do. At that precise moment of the meeting of the minds, when the Treasurer sold and Pact, for a valuable consideration, bought the subject property, a valid contract came into being. This contract vested in Pact positive, definable property rights, *Clarke v Mayor of NYC*, 111 NY 621, 623-624, where the N. Y. Court of Appeals stated:

> "The taxes were properly imposed; they remained unpaid and a sale was authorized by statute; it was conducted in conformity to law, and *at that moment the rights of the parties* to the transaction became fixed. The vendor was entitled to the price bid, the purchaser to have a valid certificate, and in due time, upon the happening of the contingencies named in the statute a lease.
>
> If those he has obtained are invalid...by reason of the omission of any statutory condition or irregularity... the defects do not impair the sale, and consequently leave in full force the *contract* upon which he paid his money."(emphasis added)

There is further authority in New York State for the doctrine that at the Suffolk County tax sale the property itself is sold. *In Re Ueck's Estate*, 286 NY 1, 18 is authority for the doctrine that at the tax sale the tax sale buyer "...became the *inchoate title holder* of the land, evidenced by the tax sale certificate", (emphasis added), subject to defeasance only by the former owner's privilege of redemption. *Ueck* construed the Erie County Tax Act and the Buffalo City Charter, both of which contain substantially the

same language as is contained in the SCTA, under which the "*lands shall be sold* for an amount sufficient to pay all the taxes..." (§ 45 SCTA, emphasis added).

Confirming the doctrine of *Ueck* Mr. Justice Glickman in the Suffolk County Supreme Court (NY) case of *Harris v Board of Assessors of Town of East Hampton*, reported in NYLJ 11/27/68, P 19, Col. 4, stated:

> "While the purchaser at such sale in effect acquired the county's tax lien, in reality he *purchases the land* and may be divested of his right to the land *only by redemption* unless the tax sale itself is defective..." (emphasis added)

At the instant tax sale, the moment when the contract of sale was created, Pact's property rights became vested. These rights entailed that the Treasurer should execute a deed conveying "an absolute estate in fee" (§ 53 SCTA), *if* Appellees failed to redeem within 36 months, after due notice to redeem was published by the treasurer, as provided for by § 52 SCTA and § 1014 Real Property Tax Law (RPTL). When the Treasurer duly published said notice to redeem and Appellees failed to redeem, their rights were extinguished forever.

POINT III

APPELLANT CONTENDS THAT ANY STATUTE WHICH EMPOWERS A THIRD PARTY WHO IS UNRELATED TO THE CONTRACTING PARTIES, TO COMMIT OR OMIT ANY ACT AFTER THE MAKING OF A CONTRACT, WITH THE RESULT THAT THE CONTRACT BECOMES VOID, IS UNCONSTITUTIONAL.

This position is stated at page 8 of the Jurisdictional Statement. In developing this point it is submitted that on

11/16/64 Appellant entered into a valid contract with the Treasurer. If the contract was valid in creation no subsequent act of omission by the Babylon Town Receiver can destroy the validity of this contract. The NY Court of Appeals communicated this doctrine as early as *Hardman v Bowen*, 39 NY 196, when it stated at page 200:

> "If the assignment was valid in creation...no subsequent illegal act, either of omission or commission, can in any manner invalidate it."

To the same effect is *Mabie v Fuller*, 255 NY 194,202.

§ 71 SCTA is unconstitutional because it impairs the valid contract entered into between Appellant and the Treasurer by permitting Appellant's vested rights to be destroyed and permits the contract, validly created, to become void by an alleged act of omission by a third party (Receiver) who is not even described or named in the statute.

The application of § 71 SCTA is to be construed as of the date that the act complained of (omission of "arrears" stamp) is to be performed. Since that act was subsequent to the contract's creation, the "impairment" doctrine is applicable under the authority of *Williams v Bruffy*, 96 US 176. Any action authorized (under § 71 SCTA) by New York to be taken by an individual (Receiver), pursuant to that authority, is a State action. When that action is taken, the State intervenes at that moment. In the instant case that took place *after* the executed tax sale contract which vested in Pact its property rights.

Therefore, § 71 SCTA must be held to be unconstitutional as authorizing the impairment of a valid prior contract, repugnant to Article I, Sec. 10 of the U. S.

Constitution.

POINT IV

ALL THE CONSTITUTIONAL QUESTIONS RAISED BY APPELLANT BEFORE THIS COURT WERE RAISED BELOW

This case went before three Courts in New York, Special Term of the Supreme Court, the Appellate Division, 2nd Department and the N. Y. Court of Appeals. The constitutional questions raised before this Court were raised in every N. Y. Court.

Appellant raised the constitutional questions in its answer and elaborated thereon in its arguments and briefs before every tribunal. Appellees did not seek any relief by way of corrective motion or otherwise addressed to that part of the answer which raised the constitutional questions.

The N. Y. Courts have pointed out that under the N. Y. Civil Practice Law and Rules (CPLR), which became effective 9/1/63, the emphasis with respect to pleading should be placed "upon the primary function of pleadings, namely that of adequately advising the adverse party of the pleader's claim of defense.", *Foley v D'Agostino*, 21 AD2d 60 (NY).

In the latter case it was further stated:

> "Finally, every pleading question should be approached in the light of the CPLR enactment that pleadings "shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

In a footnote of the Court's opinion the following quote

appears:

> "This is a statment of a fundamental tenet of modern practice; the pleadings and other forms of procedures are only a means to the end of resolving the controversy between the parties. Even if a pleading be technically in violation of some rule of good pleading, what does it matter if substantial rights of other parties are in no way prejudiced." (Wachtel, New York Practice, p. 108)

The Appellees failed to move for any amplification of the pleadings or for any corrective relief. That demonstrates that the Appellees understood the crux of the pleading and cannot now question the sufficiency thereof for the first time.

The record (R22) refers to "other arguments...on constitutional grounds" raised in the "accompanying memorandum of law". The same reference is made to "The constitutional questions raised herein, presented in my memorandum of law, as a matter of law, demonstrated the lack of a constitutional basis for the amended complaint's attack on the tax sale and tax deed." (R24). This indicates the fact that Appellees were alerted to the constitutional questions raised by Pact from the very start.

What is clear is that the constitutional questions were raised below.

POINT V

APPELLEES FAILED TO MEET PACT'S ARGUMENT THAT THE LOWER COURTS DEPRIVED PACT OF ITS PROPERTY RIGHTS WITHOUT DUE PROCESS

The Court of Appeals passed on all the foregoing constitutional questions presented before it. By affirming, without opinion, the lower Courts' determination, it in effect said that §71 SCTA is constitutional and that, by its operation, the lower Courts constitutionally divested Pact of its property rights acquired at the valid tax sale and through the valid tax deed, without violating Pact's rights under the due process clauses of both the N. Y. and U. S. Constitutions.

The lower Courts' silence and failure to say a single word about the constitutional questions repeatedly presented by Pact must lead to the conclusion that the lower Courts held that the divestiture of Pact's title was proper on the grounds that Pact never had any property rights in the first place; that what took place at the tax sale was illegal because of a later act (omission of an "arrears" stamp on the later issued 1964/65 tax bill) to be performed by a party unnamed in §71 SCTA, not connected with the tax sale contract; that the divestiture of Pact's property rights acquired at the tax sale could take place by the empowering of that third party, by design or accident, to so act (omitting "arrears" stamp) as to destroy the prior legal contract entered into between Pact and the County Treasurer.

We respectfully submit that Pact was deprived of its property in violation of the due process clauses of both the N. Y. and U. S. Constitutions.

In any discussion about the lower Courts due process accorded Pact, reference must be directed to another statute

of the State of New York. That statute is § 1160 RPTL.

Leaving aside for the moment the 1959 amendment to § 70 SCTA and its effect on § 71 SCTA, we must examine § 71 SCTA itself. Special Term had applied the doctrine of *Stebila v Mitrany*, 21 NY2d 930, construing the pre 1959 370-71 SCTA, which upheld the theory that "omission of the word "Arrears" on a subsequent tax bill, held that the provisions of Section 70 and 71 SCTA are *mandatory* and require strict compliance." (R138) (emphasis added). Special Term repeats the phrase "mandatory requirements" (R143). Appellees argue about "the failure...to perform the duties imposed...by the *mandatory* and *jurisdictional* requirements...resulted in a nullification of said entire contract..." (P36-Motion). In other words, Appellees argue that the stamping of "arrears" was a "mandatory" act, and its omission on the 1964/65 tax bill on 12/1/64 reached back to *jurisdictionally* destroy the earlier valid tax sale of 11/16/64.

An examination of the language of § 71 SCTA shows no finding of the words "mandatory" or "jurisdictional". § 71 SCTA contains no negative words showing that the results of such an omission are to void the earlier tax sale (*LANCASTER SBICO v CITY OF NY*, 214 NY 1, 11-12). Lacking express language to that effect we must go to § 32 SCTA to find out if legislative intent was that the stamping of "arrears" was mandatory and if omitted, a jurisdictional defect in the earlier, valid tax sale.

§ 32 SCTA provides:

> "The tax law shall apply and govern in all matters relating to taxation in Suffolk County not inconsistent with the provisions of this act." (Ch 311, Laws 1920).

Proceeding to the general tax law we find § 1160 RPTL (1) which provides, in part:

> "All provisions with respect to procedure upon tax sales and sales of tax liens *requiring acts to be done* at or before specified times or dates...shall be *deemed directory* and failure to take such action...shall not invalidate or otherwise affect such tax lien nor prevent...proceedings...for collection thereof...*nor affect the title of the purchaser under such proceedings.*" (Ch 959, Laws 1958) (emphasis added)

In the face of this positive expression of legislative intent we ask where and how and by what reasoning have the lower Courts arrived at the conclusion that the provisions of § 71 SCTA are "mandatory" (R138)? The only answer is that the lower Courts did not obtain this information from the Legislature, but created, by judicial decree a Legislative intent that is directly contrary to expressed Legislative intent to treat the provisions of § 71 SCTA as directory only, preserve the sanctity of the tax sale and *to protect the title of the tax sale purchaser.*

It is respectfully submitted that there was no due process accorded to Pact; that it was divested of its property without due process, in violation of both the N. Y. and U. S. Constitutional provisions relating thereto.

POINT VI

THE CASE OF LONDON V HAMMEL IS NOT APPLICABLE HEREIN

Under their Point VIII Appellees raise the case of *London v. Hammel*, unreported, decided by the N. Y. Court of Appeals on 6/15/1970. This is not applicable here because (1) it did not involve an attack on the tax sale contract as was done herein; (2) it did not consider the constitutional questions that were raised by the instant case; (3) the Suffolk County Treasurer was not made a party defendant in the *London v. Hammel* case.

In order to demonstrate the importance of the Treasurer being made a party defendant *(Costa v. Harris*, 26 AD2d 933 (NY) in any attack on the tax sale contract or tax deed issued by him, we respectfully submit the following argument.

Had the Treasurer been a party before the New York Court of Appeals in *London* he could have raised the arguments that (1) The redemption period under the SCTA is 3 years, whereas the redemption period under the NY RPTL is 1 year. (2) With a one year redemption period there never could be any subsequent taxes paid by a tax sale buyer. Therefore, the situation that arose in *London* could never arise under the RPTL. (3) That the New York Legislature's enactment of the language of §1014 RPTL that the redemption advertising contain "the amount necessary to redeem the same computed to the last day in which such redemption can be made..." intended to refer to (a) the amount of the tax sale *and* penalties, interest and advertising costs; (4) That the Legislature had before it, when it passed the RPTL, only a one year redemption period, as covered by said RPTL and could not have had in mind applying the

language to a special local act like the SCTA where the redemption period was more than one year. (5) That § 32 SCTA (Ch 11, Laws 1920) provided that the general "tax law shall apply and govern in all matters relating to taxation in Suffolk County *not inconsistent* with the provisions of this act," (emphasis added). Therefore, applying the general tax law (RPTL) that concerned itself with a one year redemption period *was inconsistent* with the SCTA which authorized a three year redemption period.

Further, in the *London v. Hammel* case, the taxpayer *made an attempt* to redeem the tax sale bringing insufficient money to redeem *before* the expiration of the redemption period and he was told by the Treasurer's agent that he had additional two years time in which to redeem. It was not shown if, in reliance on that statement, the taxpayer did not return before the redemption period had expired.

The doctrine of *Van Benthysen v. Sawyer*, 36 NY 150, that it is a question of fact as to whether the action of the County Treasurer's agent prevented the redemption might have applied in *London*.

In the instant case, unlike what happened in *London*, Appellees made no attempt to redeem the 11/16/64 tax sale, *before* the expiration of the redemption period. Their attack on the instant tax sale contract was made *after* the redemption period had expired on the grounds mentioned in the complaint.

We respectfully submit that *London* must be restricted to solely the facts of that case and not be applied generally to the instant case where the question of the validity of the redemption advertising had not even been raised below.

Thus the *London v. Hammel* case is not applicable herein.

POINT VII

THE FAILURE OF THE NOTICE WHICH APPELLEES COMPLAINED THEY FAILED TO RECEIVE, BY OMISSION OF THE "ARREARS" STAMP ON THE 1964/65 TAX BILL, HAS TO BE A FAILURE OF A NOTICE TO REDEEM

The valid tax sale took place 11/16/64. The only method by which that tax sale can be eliminated is by redemption. Therefore any notice relating to that tax sale issued after the tax sale took place has to be a notice to redeem. The alleged failure of "notice of arrears...in the subsequent tax bill for the tax year 1964/65" (complaint, R40), to have been given on 12/1/64, when the 1964/65 tax bill was rendered is a notice to redeem from the earlier 11/16/64 tax sale.

The power to create what is a notice to redeem is reserved to the Legislature, under Article III, Sec. 1 of the N. Y. State Constitution. Thus Special Term's creation of the "arrears" omission as another notice to redeem was judicial legislation, violative of Article III, Sec. 1 of the N. Y. State Constitution.

Lastly, Appellees' statements contained in their Point IX are irrelevant to the motion now before this Court. Their irrelevancy make it unnecessary to make any extended remarks thereto.

CONCLUSION

The issues raised by this appeal are properly before this Court and Appellees' Motion to Dismiss should be denied.

Respectfully submitted,

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SECTION 32

SEC. 32. APPLICATION OF TAX LAW. The tax law shall apply and govern in all matters relating to taxation in Suffolk County not inconsistent with the provision of this act. (Chapter 311, Laws of 1920, in effect April 22, 1920).

SECTION 40.

SEC. 40, COLLECTION OF TAXES AND ASSESSMENTS SHALL BE ENFORCED BY SALE. The collection of every assessment and every tax upon real estate returned by the receivers of taxes as unpaid, with the interest and additions, shall be enforced by a sale of the real estate by the county treasurer, subject to the right as hereinafter provided of the purchaser or purchasers at such sale to change or convert such sale into a transfer of the tax lien or the right of the county to collect such taxes. Such sale shall be held within six months after the return of unpaid taxes to the county treasurer. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929).

SECTION 43.

SEC. 43. ADVERTISEMENT OF NOTICE OF SALE. The county Treasurer shall, within six months after the return, cause to be published at least once a week in each week, for six successive weeks, in the two newspapers, designated for the publication of concurrent resolutions, a list of all real estate so liable to be sold for unpaid taxes and assessments and together with a notice that said real estate will be on a day specified in such notice, and the succeeding days, be sold at public auction at the county center, Riverhead, Suffolk County, New York, or such other place within the county as the treasurer designates in such notice.

SECTION 43. (CONTINUED)

If the property affected is situated in a town other than that in which the newspapers designated as above required are located, those parcels so situated from such list and notice shall also be separately published in two successive issues of a newspaper in the town in which such affected property is located with such alternate newspaper to be designated by resolution of the board of supervisors. By such advertisement the owner or owners of such lands and tenements respectively shall be required to pay the amount of such tax or assessment, with the said penalties and interest thereon remaining unpaid with the charges of such notice and advertisement, to the county treasurer, and notice shall be given by such advertisement, that if default shall be made in such payment, such lands and tenements will be sold at public auction at a day and place therein to be specified for the amount of the taxes, together with the interest, penalties and other charges thereon, then a lien on such property, and for the lowest rate of interest during the period of redemption, or until such property be redeemed, at which any person or persons shall offer to take the same; such list shall contain the name of the owner or occupant of each piece of real estate to be sold, as the same appears upon the assessment roll of the year in which such unpaid taxes were levied, and a brief description of such real estate, and the total amount of such unpaid taxes, which said total amount shall include all taxes, interest expenses and other charges against the property for the year or years advertised.

2. This act shall take effect January first, nineteen hundred sixty-five.

SECTION 45.

SEC. 45. SALE OF PROPERTY FOR UNPAID TAXES. If the owner, mortgagee or occupant of or party in interest in such real estate do not pay such tax or assessment, with the costs additions and charges, within the period stated in such advertisement, then the county treasurer shall, without further notice, commence the sale of lands specified in such notice of sale on the day set for that purpose and continue the sale from day to day until every such lot or parcel is sold. Such lands shall be sold for an amount sufficient to pay all the taxes and assessments due thereon for the years for the taxes of which said sale shall be made with interest thereon to the time of sale, and all costs, expenses and charges accrued thereon and, subject to reductions as herein provided said amount paid for such property shall carry and bear the maximum interest and penalties as follows: Six per centum on the purchase price, if redeemed within six months of date of sale. An additional six per centum on purchase price if redeemed after the expiration of six months and within twelve months of the date of sale. An additional six per centum on the purchase price if redeemed after the expiration of twelve months and within a period of eighteen months of date of sale. An additional six per centum on the purchase price if redeemed after the expiration of eighteen months and within a period of twenty-four months of date of sale. An additional six per centum on the purchase price if redeemed after the expiration of twenty-four months and within a period of thirty months of date of sale. An additional six per centum on the purchase price if redeemed after the expiration of thirty months and within thirty-six months of date of sale. The rate of interest at which any person or persons shall offer to take the lot or parcel of land to be sold shall be established by his bid. The rate thus established shall be the

rate of interest for every period of six months or fraction thereof up to the time of the redemption of the property purchased and until the expiration of three years, plus all taxes paid by the purchaser with interest thereon at six per centum per annum to the date of payment. At such sale, rates of interest shall be bid in multiples of one per centum or a flat bid of no interest whatsoever and parcels shall be sold and bid upon separately. If more than one person bids the same rate of interest, the county treasurer or person conducting the sale shall sell the parcel to whichever of such bidder as he in his sole discretion shall determine. In any case, however, and as to any parcel, the county may reject any and all bids and bid in and purchase the same for the county at the maximum rate of interest in which event the bid of the county shall be preferred over all other bids. The county shall likewise be deemed the purchaser at the maximum rate of interest of all parcels which are not sold at such sale. The board of supervisors may by resolution exclude from sale such parcels as it determines where the county has entered into any agreement concerning the disposition of tax liens thereon with a tax district or other person pursuant to section one hundred sixty-six-a of the tax law or other provision of law. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 207, Laws of 1934, in effect April 13, 1934; by Chapter 175, Laws of 1937, in effect April 5, 1937; amended by Chapter 745, Laws of 1959, in effect April 23, 1959.)

Real Property Tax Law 1160(1)

(Chapter 959, Laws 1958)

1160. TAX SALE AND SALE OF TAX LIEN

1. It shall be the duty of the enforcing officer to enforce annually all tax liens by a tax sale, in accordance with the provisions of law governing the conduct of such sales, except

as otherwise provided herein. The failure of the enforcing officer to enforce such tax lien shall not impair the lien or prevent a sale or stay any other proceedings for its enforcement after the time specified. All provisions with respect to procedure upon tax sales and sales of tax liens requiring acts to be done at or within or before specified times or dates, except provisions with respect to length of notice, shall be deemed directory and failure to take such action at or within the time specified shall not invalidate or otherwise affect such tax lien nor prevent the accruing of any interest or penalty imposed for the non-payment thereof, nor prevent or stay proceedings under this article for any of the remedies for collection thereof in this article provided, nor affect the title of the purchaser under such proceedings.